Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF DAN J. WIGGER
ON BEHALF OF ADVANCED TELCOM, INC.

I, Dan J. Wigger, hereby declare under penalty of perjury that the following is true and correct:

1. I am employed by Advanced TelCom, Inc. ("Advanced Telcom" or "ATI") as its Vice President – Network Engineering & Operations. My business address is 463 Aviation Blvd., Suite 120, Santa Rosa, CA 95403. My primary job responsibilities include overseeing: Field Operations; Switch & Network Engineering; Switch, Network, & Facilities Planning – Implementation – Management; Repair Services & Technical Support Functions; and Network Economics.

2. Company is a facilities-based Competitive Local Exchange Carrier ("CLEC"). Based in Santa Rosa, CA, Advanced TelCom owns and operates fiber optic rings with associated switching and optronic equipment in **7** metro area markets in **4** states. Advanced TelCom operates **7 Digital Circuit Switches** (Lucent and Nortel) located in Host Sites that are interconnected to other carriers and retail end-user customers through **24** SONET based Fiber Rings that use approximately **100 miles** of ATI constructed and owned fiber and approximately **500 miles** of leased dark fiber. The network also requires interconnection to Inter-Office

Dedicated Transport Facilities to reach its ILEC Collocations, and ultimately its unbundled network elements ("UNEs"), for last mile access to its retail customers. The company offers a complete set of telecommunications services, including local and long distance voice, Internet access and ISP services, Web Hosting, Customer Collocation, and Integrated voice and data services. Services are provided to more than **18,000** business customer accounts by means of a combination of the company's own facilities, UNEs, enhanced extended links ("EELs"), other services purchased from Incumbent Local Exchange Carriers ("ILECs"), and facilities and services purchased from other competitive telecommunications carriers.

3. Advanced TelCom operates local fiber networks in 4 states in the Western portion of the United States. Specifically, our metro facilities-based networks are located in Tacoma, Olympia, Everett, Bellingham, and Yakima, WA; Portland, Salem, Albany/Corvallis, Eugene/Springfield, Bend/Redmond, Medford, and Grants Pass, OR; Santa Rosa, Rohnert Park, and Petaluma, CA; and Reno and Carson City, NV. In each facilities-based area, we purchase 2-wire voice grade, DSL qualified, ISDN qualified, high-capacity loop, and transport UNEs from ILECs to complement our own fiber optic transmission and digital switching facilities. We obtain such UNEs pursuant to local interconnection agreements with Qwest, Verizon, SBC-Pacific Bell, and SBC-Nevada Bell.

I. PURPOSE AND SUMMARY

4. The purpose of this Declaration is to explain the critical importance to Advanced TelCom of high-capacity unbundled loop and interoffice transport UNEs. I will describe how Advanced TelCom utilizes DS-1 UNEs to provide last mile connectivity to commercial premises where its customers are located. In Part II hereof, I will discuss how critical the availability of economic DS-1 and DS-3 loop facilities are to Advanced TelCom's ability to provide competitive telecommunications services. Then in Part III, I will explain how

Advanced TelCom decides to build its own loop facilities into buildings, and show how it normally is not feasible for Advanced TelCom or other CLECs to construct their own wireline DS-1 and DS-3 UNE facilities. In Parts IV and V, I will demonstrate that wireless loop technology and cable television systems are not adequate substitutes for wireline high-capacity UNE loops. Part VI details the significant resources that ATI has and would have to expend in order to self-provision transport facilities. In Part VII, I will explain why the Commission should not conclude that there is a viable wholesale market (non-ILEC sources) for transport. Finally, in Part VIII, I will explain why resale of ILEC Special Access services cannot sustain competitive entry.

5. In this Declaration, I will explain that Advanced TelCom is a true facilities-based CLEC that is committed to deploying its own facilities wherever such construction can be economically justified. We believe that the key to long-term success lies in the installation and use of our own facilities wherever reasonably possible. Let there be no doubt, we prefer *not* to rely upon use of the facilities of our principal competitors – the ILECs – to fill out our networks. But as was made clear by the bankruptcies experienced by most facilities-based CLECs over the past several years, constructing facilities based "on spec," where customer demand is not assured, is an unsustainable business proposition. This is especially true now, as the capital markets are simply "closed" to supporting facilities construction where efficient near term use is not clearly demonstrated. Thus, we simply must have access to high-capacity ILEC UNEs while we expand our networks and build our customer base.

II. HIGH-CAPACITY LOOPS ARE ESSENTIAL TO ADVANCED TELCOM

6. Advanced TelCom's base of more than **18,000** customer accounts is primarily comprised of small- and medium-sized businesses. Currently, these businesses have an ability to aggregate loops on their premises with a PBX or Key System to gain access to the

facilities-based Advanced TelCom network utilizing T-1 UNE loops. Advanced TelCom also utilizes high-capacity T-1 UNE Loops to aggregate voice and data services from a customer's premises to Advanced TelCom's collocated equipment located in the ILEC's Central Office. A majority of Advanced TelCom's existing customers (in fact, **60%-65%** of Advanced TelCom's Voice Line Equivalents) subscribe to services that require connection to our backbone network over a T-1 level UNE facility. As a general matter, our small- and medium-sized business customers are connected to the Advanced TelCom network with 2-wire voice grade and DS-1 UNE loops.

7. Advanced TelCom offers a suite of services (Digital and Analog Business Trunks, ISDN BRI, ISDN PRI, Integrated Voice and Data Access via T-1, DSL, etc.) that are ideally suited for any small or growing company or office location with moderate bandwidth (128 Kbps to 1.544 Mbps) requirements. Our customers often elect an integrated access product which requires a T-1 level UNE, in which the customer's local, long distance and Internet access are delivered over the same loop facilities. Whenever the customer requires at least 6 or more lines/trunks and/or a minimum of 6 channels for an integrated access product, Advanced TelCom generally provides the service via T-1 access. Advanced TelCom's business model is focused on our customer's most popular product choice, which is integrated T-1 voice and data access. At the present time, Advanced TelCom estimates that **70%** of its new customers that are being added to the Advanced TelCom network require the use of a T-1 level UNE facility versus other access methods.

8. From the foregoing, it is apparent that DS-1 level loop connectivity to customers is absolutely essential to Advanced TelCom's ability to deliver services to our small- and medium-sized business customers. Advanced TelCom has attempted to deliver these services by purchasing T-1 loop facilities from other competitive carriers. However, as I will

explain later in this Declaration, the availability of those options — albeit preferred — are extremely limited in our operating areas. Thus, in the vast majority of instances (approximately **97% of the time**) we must rely upon the use of legacy ILEC facilities to connect to customer locations at the DS-1 level.

9. The market for our business services is extremely competitive. We compete for customers based in large part upon our ability to introduce new product and service options to Tier 3 and 4 market areas, and by offering superior service levels, disciplined and redundant network route design for reliability and performance, and very focused and personal consultative sales. However, all of these differentiating features are not sufficient to make sales unless we also are competitive on price. The bottom line is that Advanced TelCom is normally unable to convince customers to subscribe to its services unless it offers a lower price than the ILEC for comparable services. The need to be the low-cost alternative is a simple fact of life when you are competing against an incumbent monopoly with a century of brand name recognition.

10. Our business services typically are offered on very tight operating margins. Advanced TelCom's operating margin is less than 5%. Unlike the ILECs, we have no monopoly services that can be used to cross-subsidize unprofitable operations elsewhere in our business. Thus, we are unable to price below cost on any of our significant service offerings and remain in business. Thus, it is critical that we control costs, and that critical inputs to our cost of service not exceed similar costs incurred by our primary competitors — the ILECs.

11. As I explain in Part III hereafter, it simply is not economically rational for Advanced TelCom to build its own DS-1 loop facilities. Thus, in the vast majority of cases, we must purchase DS-1 loop facilities from the ILECs to serve our large base of small- and medium-sized business customers. Of course, Advanced TelCom is able to order such services out of the

ILEC Special Access tariffs, but as I shall explain later in Part VIII, use of ILEC Special Access to provide local telecommunications services is not economic. Since ILEC Special Access rates are not set based on any cost-based pricing principles, and ILECs commonly build enormous profit margins into their Special Access rates, Advanced TelCom is simply unable to price retail services competitively when it must use ILEC Special Access services to connect to customers. Thus, we must rely upon the availability of ILEC high-capacity loop UNEs, for which prices are based on TELRIC costing principles, to serve our customers economically. It is only when we have cost-based ILEC DS-1 and/or DS-3 loop facilities available that we can compete for small- and medium-sized business customers based on a level economic playing field.

12. Notably, the DS-1 loops that we lease from ILECs are of two types. We use both UNE Loops and EELs. In both cases, Advanced TelCom is required to establish collocation arrangements in ILEC central offices to obtain access to DS-1 loop facilities. Advanced TelCom currently operates **35** such collocation arrangements serving **25 markets** in its 4 states. Markets are defined as distinct cities within the 4 states in which Advanced TelCom has both facilities-based network coverage and field operations personnel in place operating its ILEC Collocations. It is within the ILEC Collocations where Advanced TelCom's equipment connects to both UNE Loops and EELs. Such collocation arrangements are very costly. We estimate that Advanced TelCom incurs approximately **$325,000** in costs over the first three years ***at each collocation site***. These costs include applying for collocation space, building out the collocation space with internal equipment racking (power distribution – and cross-connect/distribution frame capabilities), purchasing transport and access equipment, outsourcing Engineering & Installation (E&I) to a registered and certified Inside Plant Installation Vendor who can work within the ILEC Central Office. The Total construction costs are approximately **$250,000**. Following the build out, we add recurring charges for space rent and power, and the

costs of purchasing and installing Common Facility Assignment points to enable the interconnection of our equipment with the ILEC's network — End Office & Tandem Switches, UNEs, and InterOffice Facilities (for Transport). The **recurring cost** portion is approximately **$75,000** over the first 3 years.

13. Largely due to the cost of collocation, Advanced TelCom normally cannot economically serve customers with our own switches unless those customers have sufficient demand to warrant the use of a DS-1 level loop. We generally figure that it is not economic for Advanced TelCom to serve customers over DS-1 loops that use less than 6 voice lines or 6-12 voice and data circuits in combination. Advanced TelCom's customer base served via DS-1 loops currently averages approximately 6-8 lines.

14. Thus, Advanced TelCom relies heavily on the availability of cost-based DS-1 UNEs to serve approximately **65%-70%** of our customer account base through its collocations. Without access to ILEC provided DS-1 loops priced at cost, our existing business would be challenged, future business crippled, and future sales plans totally undermined.

III. ADVANCED TELCOM CANNOT BUILD ITS OWN WIRELINE HIGH-CAPACITY LOOP FACILITIES

15. Advanced TelCom is a facilities-based CLEC. We both build our own fiber optic transmission networks and install our own switching and data equipment wherever it is economically feasible for us to do so. We have invested very heavily in constructing such network facilities. Indeed, we have spent approximately **$10-$12 million** to establish fiber rings in 7 metropolitan areas, and currently operate **7 switches** and approximately **100 route miles** of owned fiber and approximately **500 route miles** of leased metro fiber transport facilities.

16. Whether the service provided to customers is switched or dedicated, the loop facility is the most basic component of the network required to serve a particular customer.

However, the economics of building loop facilities is fundamentally different than the economics of deploying switching and transport facilities. When Advanced TelCom installs switches and transport facilities, those network components are used in common (and paid for) by many customers. By contrast, loop facilities are dedicated to the use of one or a very small group of customers. Given the very high cost of facilities construction, it can be sensible to build transport and switching facilities in areas where there is adequate aggregate potential demand in place, whereas it normally makes sense to build loop facilities only where you have assurance that a particular customer or group of customers will contract with you to provide very high-capacity services over an extended period of time.

17. By way of background, when Advanced TelCom had constructed its local fiber network, the system plan was to create a very high-capacity backbone network connecting its Local Serving Offices ("LSOs") (at ILEC Collocations) with the Advanced TelCom Central Office or Host Site in each metropolitan area. This very high-capacity backbone network is referred to as Advanced TelCom's LSO Access Ring. The LSO Access Ring consists of interoffice fiber optic facilities deployed between Advanced TelCom's ILEC central office collocations and between Advanced TelCom's ILEC central office collocations and Advanced TelCom's Central Office or Host Site which. This is the method by which Advanced TelCom can connect collocation equipment installed in some of its ILEC collocations with Advanced TelCom's own switch or host site. Other Advanced TelCom ILEC central office collocations utilize leased transport from the ILEC and, where available, from other competitive carriers using DS-3 transport. End user customers served from each Advanced TelCom ILEC central offices collocation are connected to the ILEC central office collocation through unbundled loop UNEs.

18. In addition to using an LSO Access Ring, Advanced TelCom has created a very small amount of Fiber Laterals, which are fiber spans connected and spliced into its existing LSO Access Rings to provide access to commercial buildings. ATI has not built any of these in the past 3+ years. To serve customers located in those existing buildings with our own loop facilities, Advanced TelCom would have to build new Fiber Laterals, requiring it to trench, install conduit, pull and place fiber, and/or install fiber aerially on joint-use utility poles between the LSO Access Ring and the building to be served by the Fiber Laterals. In addition, Advanced TelCom must then obtain and outfit equipment space in the building itself.

19. Fiber Laterals are quite expensive. A typical Fiber Lateral is approximately 1/4 mile in length, and connects approximately 1-2 buildings, at an average gross investment cost of approximately **$75,000 to $100,000**, which includes the cost of underground or aerial fiber construction as well as fiber transport equipment, UPS, and protective racking/cabinets for the electronics at the commercial building. Simple math tells you that the per-building cost of such Fiber Laterals is in the neighborhood of **$37,500 to $50,000**, and simple logic tells you that such a sizeable investment is justified only to the very largest buildings in the very highest density zones serving enterprise level customers. Consequently, Advanced TelCom views the approach of directly connecting to a customer using a Fiber Lateral as a complete exception, not the rule, and has determined that this is not an economic alternative for its small- and medium-sized potential customers located primarily in single-tenant buildings in Tier 2, 3, and 4 markets. Finally, in markets where Advanced TelCom has existing LSO Access Rings, it has only used a direct Fiber Lateral to serve a grand total of 17 commercial buildings. This extremely small amount of Fiber Laterals had been developed well over 3 years ago. I can certainly say that this is a non-material amount of facilities, and represents an extremely limited amount of the potential market that Advanced TelCom's facilities-based

network can serve. This demonstrates the extreme economics that must be available to make this service arrangement feasible.

20. The construction of Fiber Laterals to connect commercial office buildings to the Advanced TelCom network is not only costly, but also extremely difficult and time-consuming. It is important to realize that CLECs have no absolute right to build into the complexes at which customers reside. We must negotiate municipal franchises, private Right-of-Way ("ROW") licenses, and building access agreements with Property Owners or Landlords, which may or may not provide access at economic prices or for any reasonable time frame. Often times there are permits that are required for trenching or boring, and sometimes rezoning is necessary, both of which are uncertain prospects. Unless these hurdles are crossed — and many times they cannot be (examples: environmentally protected areas, street moratoriums and/or assessments due to recent or newly paved streets) — we simply are unable to construct that Fiber Lateral regardless of customer demand or desires. In such instances, the ILEC loop facilities are the only route into the building, and constitute an absolute monopoly bottleneck facility.

21. Even where we can clear all of the right-of-way related hurdles discussed above, building a lateral to add a building to the Advanced TelCom network is a formidable undertaking. From our operating experience, to reach a building located a 1/2 mile from an existing Advanced TelCom LSO Access Ring would typically cost approximately **$100,000 to $150,000** and is not even considered. Buildings that are much closer conceivably can be reached, but also at a substantial cost. In addition to the cost of obtaining right-of-way and building access rights (including both getting into the building and preparing Point of Presence, or "POP" space), there are substantial costs associated with the required trenching or boring, acquiring and laying conduit and fiber and/or placing fiber on joint-use utility poles, restoring surface conditions (landscape and street pavement), and installing the requisite fiber transport

and electronic equipment both at the Advanced TelCom Host Site and at the customer premise. Consequently, even short Fiber Laterals of a few hundred feet or less are quite costly. We estimate that the average total cost of constructing a Fiber Lateral to directly access a typical building at just 300 feet from an existing LSO Access Ring to be approximately **$25,000 - $30,000**, this is inclusive of all costs described above. It should be noted that there is a very limited market opportunity, even if this was cost effective, of serving small- and medium-sized business customers located within such a limited distance from Advanced TelCom's existing LSO Access Rings. In addition, the majority of small- and medium-sized business customers in our Tier 3 and 4 markets occupy single tenant commercial buildings, which effectively limits Fiber Lateral projects that generally require multiple customers (and sales) to justify their costs. Therefore, at this investment level, an average small or medium sized customer paying as much as $750 per month (unlikely in our price competitive industry) for a complete package of Integrated Voice & Data Services using a DS-1 over a Fiber Lateral could be expected to take approximately **3 years** to recover the investment using simple payback methodology. We have found that it is a challenge to obtain a 3-year term commitment from any small or medium sized business for its communications services at present, making this a high-risk, no-win investment decision.

22. Importantly, in addition to the capital cost of construction, the building of Fiber Laterals is very time consuming. The time required to obtain all of the necessary legal clearances, and then actually construct the lateral, is a minimum of 4 months best case, but often takes much longer than that. Customers with moderate telecommunications requirements, such as the small- and medium-sized businesses that typically utilize DS-1 level access, normally are unable and/or unwilling to wait such a long time for the delivery of services.

23. Due to the extraordinary cost of constructing Fiber Laterals, Advanced TelCom's current policy is simply not to add a building to its network. Advanced TelCom has made the decision that any direct commercial building addition through the use of a Fiber Lateral is an absolute exception and would only be warranted in the event of a minimum DS-3 level bandwidth requirement (for very limited distance from an existing LSO Access Ring <500 feet) up to OCn (assume OC-3) requirement (for up to a ½ mile distance from an existing LSO Access Ring) coupled with a long-term contract by an enterprise-level customer. One thing can be said for sure, it would never make sense to construct a lateral to add a building to the Advanced TelCom network simply to add customers with DS-1 level demand.

24. As I explained above, it almost never is economic for Advanced TelCom to construct its own wireline DS-1 loop facilities. Neither does it make sense to construct Fiber Laterals capable of supporting DS-3 loop facilities or even OCn level bandwidth facilities when potential customers are not located in the immediate vicinity of our existing LSO Access Rings. In addition, Advanced TelCom rarely, if ever, has been able to purchase DS-1 loop facilities from other CLECs or CAPs. This is true of all of our markets across our 4 operating states, with only one exception. Advanced TelCom has one market, the Tacoma/Olympia market, where it has found competitive alternate last mile access at the T-1 level, but this option is limited to the City of Tacoma. Advanced TelCom created a Point Of Interconnection (POI) to what is known as the Click! Network. The Click! Network if a Competitive Access Provider Fiber Ring that serves the City of Tacoma. As a result, it should be noted that Advanced TelCom uses the Click! Network Fiber Ring only if the Click! Network has existing commercial building access to a location in which Advanced TelCom has a prospective customer, *and* where the Click! Network has existing fiber equipment with add/drop capability at the DS-1 level/rate. Advanced TelCom cannot reach its customers using this alternative means of access if its customers reside in

buildings or areas not served by the Click! Network fiber. Examples are Olympia, Lacy, and Puyallup. As such, this alternative T-1 level access opportunity is quite limited, and currently represents just **10%** of the total T-1 loops that Advanced TelCom utilizes in Washington State The rest (>900 T-1 Level Access Loops) are provided by the ILECs (Qwest and Verizon). Furthermore, this alternate T-1 loop access opportunity is available in just 1 of the 3 metropolitan areas Advanced TelCom serves in Washington State. Advanced TelCom has researched similar alternate T-1 level access opportunities in other markets and has not found alternate carriers that provide T-1 level wholesale products to commercial buildings. It should be noted that even if wholesale opportunities were to be found in the future, the serving potential would remain limited to only the buildings alternate carriers had fiber access. We believe this would represent a very limited market compared to the total small- and medium-sized business population who are located in any given area that Advanced TelCom serves.

IV. WIRELESS TECHNOLOGY IS NOT WIDELY AVAILABLE AS A DS-1 LOOP SUBSTITUTE

25. ILECs have occasionally suggested that CLECs such as Advanced TelCom could use fixed wireless technology to connect to their customers. Obviously, we wish that were true. Such a bypass technology would have enormous value to us. Unfortunately, wishing does not make it so. In our experience, fixed wireless is not an economic or technically acceptable substitute for wireline UNE loop facilities.

26. It is notable that the two companies that made by far the most aggressive attempt to deploy and sell fixed wireless technology and bypass loop alternatives have both failed. The two companies were Teligent and Winstar, both of which invested hundreds of millions of dollars in failed efforts to deployed fixed microwave systems. They discovered that there are very real barriers to be overcome in making fixed microwave systems commercially practical.

27. These fixed microwave systems are only useful for short haul applications. They require a direct line of sight between the customer location and the provider's network node. Moreover, signal strength fades with distance and is further attenuated by precipitation. As a consequence, we believe that microwave systems are not usable at ranges of more than 1 or 2 miles, which limits access to many of Advanced TelCom's potential markets without a complete modification to Advanced TelCom's existing network technology in the area of access equipment. In addition, Advanced TelCom is uncertain as to how it could utilize its embedded transport and access infrastructure using microwave systems that would ultimately require, at a minimum, interconnection with its existing transport equipment at the ILEC Central Office.

28. Even where these problems can be overcome, the technology can work only where impediments to antenna placement can be overcome. Many building owners simply refuse to provide roof access under any conditions, while others will do so only at prices that are plainly too high for us to provide service economically.

29. Advanced TelCom will continue to investigate the use of a fixed wireless access product. We remain optimistic that a fixed wireless access alternative could offer real value to customers in the future. However, it is quite evident that we remain years away from any sort of potential widespread deployment, and that fixed wireless will never provide a connectivity solution for most of our customer base. Consequently, the potential future deployment of wireless loop technology does not currently reduce our essential need for cost-based wireline DS-1 loop UNEs from the ILECs.

V. CABLE TELEVISION FACILITIES CANNOT REPLACE DS-1 UNE LOOPS

30. Some ILECs have suggested that CLECs could opt to use cable television systems for alternative DS-1 loop facilities. To my knowledge, no cable television company has ever offered to provide DS-1 level loops to Advanced TelCom over their cable television plant.

That should not be surprising, since cable television systems were not designed to provide this type of service.

31. There is a substantial geographic incongruity between the build-out plans of most cable television companies and the needs of facilities-based CLECs such as Advanced TelCom. Our target customers are businesses, and fiber optic backbones are primarily routed in and around business districts. By contrast, most cable television systems were designed and built first and foremost to serve residential customers in suburban areas. Thus, commonly the cable television systems do not really reach the customers to which Advanced TelCom needs to connect.

32. Even where cable television networks reach our business customers, the cable television network facilities typically lack the capacity to serve large numbers of business customers that require telecommunications and Internet services at DS-1 and higher speeds. While it is true that cable television systems often have been upgraded to support the provision of cable modem services, the design of the network commonly is such to support infrequent high-speed bursts of data to and from subscribers. This is much different than a system required to support the "always on" bandwidth demands of businesses. Our sense is that cable systems normally could not provide the service availability guarantees required by our business customers.

VI. ADVANCED TELCOM COULD NOT AFFORD TO BUILD ADDITIONAL TRANSPORT

33. Advanced TelCom is a facilities-based CLEC, and we strongly prefer to use our own facilities. The truth is that of the 40 interoffice routes in our system, we have previously created self-deployment in 25 of them at this time – less than 65%. But this self-deployment occurred ***in a much different market environment*** than what exists today. As I will

explain in the following paragraphs, ATI could in no way invest the resources necessary to deploy these facilities today.

34. Building backbone fiber optic transport facilities is an incredibly expensive undertaking. The costs of self-deploying transport facilities include collocation costs, the cost of fiber, the cost of physically deploying the fiber, the cost of optronics necessary to light the fiber, and the cost of obtaining a right-of-way for the fiber deployment. The optronics that must be placed in a collocation arrangement to provide interoffice transport include optical patch panels (to terminate and cross connect the fiber facility), optical multiplexers, and power distribution equipment (*e.g*., power filtering and fuses). Although the aggregate cost of deploying fiber for use as interoffice transport can vary substantially based upon density and topography (*i.e*., urban construction typically is more costly than rural deployment), Advanced TelCom has found that placing fiber underground can average **$50 - $75 per linear foot** while placing fiber on poles can average **$15 - $20 per linear foot**, thus suggesting construction costs of placing the fiber plant itself to be in the range of **$80,000 - $400,000 per mile**. These transport costs are also considered sunk costs, since the constructed fiber facility cannot be moved to another location should we decide to exit a market.

35. Constructing interoffice transport fiber facilities also is very time consuming. While fiber can be built in rural areas at rates up to several miles per day, in the urban and suburban areas where Advanced TelCom usually provides service, we normally outsource to vendors that can build at a daily rate of between 500 feet and 1/2 mile, depending on the environment (mostly urban). We estimate that it has taken approximately **6 to 9 months** to perform feasibility studies for Interoffice Fiber routes, then to obtain the applicable rights-of-way, apply for ILEC collocation or joint structure licenses, and then to plan for and purchase equipment. Additionally, it has taken **6 to 9 months** to then actually construct the fiber and

ILEC collocations, and then install, test and turn up the equipment. This aggregate delay of approximately one year provides the ILECS with significant "first mover" advantages over us.

36. Given the extraordinary cost of constructing interoffice transport facilities, it simply is not economic to build unless we have accumulated a very large volume of traffic on a particular route. Specifically, Advanced TelCom believes that additional fiber construction does not make economic sense, in its operating areas. But, to even consider fiber construction, my opinion is that Advanced TelCom would have to accumulate a minimum of **15 DS-3s** worth of traffic on any particular route. This is assumed based on weighing the approximate average monthly cost of leased interoffice transport (DS-3) of approximately **$18,000** (approximate **$1,500** per month per DS-3) versus the cost of constructing its own interoffice fiber route, assuming a 2-3 mile E&I fiber build, consisting of a mix of both aerial and underground plant, and adding all other costs, including additional ILEC collocation costs for fiber entry and optronics. We estimate that the total cost of an average Interoffice Fiber Route to total between **$350,000 - $500,000**.

37. Given that I believe self-deployment is not economically rationale until Advanced TelCom has a minimum of **15 DS-3s** worth of traffic in a particular route, it should be obvious that it would *never make economic sense* for Advanced TelCom to self-deploy interoffice transport facilities simply to provide DS-1 level transport. Advanced TelCom has never constructed interoffice facilities simply to self-provision transport at the DS-1 level, and I cannot imagine a situation in which we could do so economically.

VII. NO CLEC, INCLUDING ADVANCED TELCOM, IS EQUIPPED TO BE A WHOLESALE PROVIDER OF TRANSPORT

38. Where we lack the traffic volumes required to construct our own interoffice facilities, Advanced TelCom must purchase interoffice transport facilities from other

carriers. We are constantly looking for opportunities to purchase interoffice transport services from other CLECs. Of course, less than a decade into the development of local competition, no CLEC has constructed facilities on most of the interoffice routes in the country. Given the enormous time, effort and capital required, it will be many years before competitive carriers – even in the aggregate – replicate the coverage of ILEC networks. But even where CLECs have in fact self-deployed interoffice transmission facilities, that does not mean that they offer access to their networks to competing CLECs. Often times CLECs that self-deploy will size their networks for their own anticipated needs, and simply do not have space capacity to sell to others. For example, as I described in Section VI, Advanced TelCom had constructed hybrid interoffice fiber routes consisting of constructing its own fiber transport plant and interconnecting that fiber plant with leased Dark Fiber providers to be able to "stitch" together and create its interoffice fiber routes. These routes serve Advanced TelCom's own network backbone needs, as many of its routes contain a limited number of leased fiber strands in sections (2 to 6 strands within long haul Interoffice Dark Fiber routes) to enable it to support 1 or 2 LSO Access Rings. These LSO Access Rings contain multiple fiber nodes located at different LSO's (or ILEC Central Office Collocations) and must transport multiple types of backbone traffic (voice, data, private line, interconnection trunking, and interconnection to leased transport).

39. Advanced TelCom does not believe it would be economically rational to wholesale its modest amount of additional capacity, as it anticipates the use of that capacity to meet its growth plan for each metro area. As a result, Advanced TelCom has not made any pursuit or investment in Wholesale Transport Product offerings such as sales channels, back-office systems, or interconnection methods (CLEC-to-CLEC Collocation facilities) in any of its ILEC Collocations. Other CLECs may have extra capacity on their Interoffice Fiber Rings, but they also may not have invested in the necessary equipment or back office systems required to

support a wholesale transport product offering as well. Generally, when CLECs construct their backbone fiber networks, they initially deploy and operate an optical interface at a range of capacities and de-multiplex that optical signal at various ILEC Collocations into usable electrical signals that must be used for their own transport or backhaul requirements. The number of electrical de-multiplexed signals is generally limited to a specific quantity of ports in Fiber Multiplex Node units. For example, an OC-3 capacity circuit has the identical capacity as three DS-3 circuits, but the OC-3 and DS-3 circuits utilize differing technological interfaces to terminate, one optical the other electrical. Thus, to offer a wholesale DS-3 service to other CLECs, a carrier must purchase, install and operate the additional electronic equipment (i.e., cards inserted into multiplexers and de-multiplexers) that is required to channelize a DS-3 circuit within a larger OCn circuit, and deliver it on the DS-3 interface or port.

40. Advanced TelCom invested in OC-48 SONET Rate Fiber Multiplexers for its LSO Access Rings. These OC-48 LSO Access Rings often interconnect 3-5 LSOs (ILEC Collocations) with Advanced TelCom's main Switch or Host Site in each of its metro areas. Each LSO generally requires 6 to 12 DS-3s for carrying Advanced TelCom's own traffic, therefore not allowing for enough port capacity within each Fiber Node to create a Wholesale Transport Product offering due to replacement cost constraints.

41. Also, the number of fiber strands can be a limiting factor as well. Advanced TelCom has fiber route sections that consist of 2-4 strands of fiber, and has OC-48 level LSO Access Rings supporting more than 4 ILEC Collocations over 2 of those strands (our policy is to retain 2 strands as "hot" spares in the event of a fiber strand or splice failure). Therefore, Advanced TelCom can support a total of 48 SONET-protected DS-3s on this typical LSO Access Ring. If the LSO Access Ring requires the de-multiplexing of 6 to 12 DS-3s worth of capacity at each LSO, a total of 24 to 48 DS-3s are needed to support Advanced TelCom's

services alone. Advanced TelCom has taken an approach that it must reserve its limited additional capacity for its own use to meet service needs versus providing wholesale services in the short term. We conclude this based on the reality that Advanced TelCom would experience a much faster LSO Access Ring exhaust rate if it provided Wholesale services and then would have to undertake the enormous costs of replicating its existing interoffice fiber route for its own internal growth needs as described above. Advanced TelCom has also determined that its sole focus is on competitive retail communications services and not wholesale services (or being a Carrier's Carrier), therefore it has not made any investments in a Wholesale Transport Product line (which would include sales channels, equipment, back office, and support functions).

42. Even when another CLEC has a wholesale DS-3 transport offering available on a route, it must be recognized that we incur significant additional costs when we elect to use it. Since a third-party carrier rarely (if ever) can provide all of the routes we need in a metro area, electing to utilize a third-party carrier requires us to incur the cost of making and managing service arrangements with multiple suppliers. These additional costs primarily consist of ordering, as Special Access, a finished service that completes the DS-3 transport connection between the alternate carriers POP and the actual ILEC Central Office, including terminating that DS-3 transport circuit into the Advanced TelCom ILEC Collocation Cage at both ends. This additional cost can be exorbitant versus a complete end-to-end DS-3 transport facility that we utilize today. In addition, service quality becomes more difficult to maintain; maintenance and repair in particular becomes more problematic.

43. For instance, if Advanced TelCom purchases interoffice transport from competitive carrier A, and arranges with the ILEC to purchase a finished (Special Access) service on both ends, should there be trouble on the circuit, 3 entities are involved, 2 sets of Trouble Tickets must be issued, and coordinated testing must be arranged. This certainly makes

the fault isolation process inefficient. In this same scenario, if a network groom needs to occur, it is also evident that multiple entities must be involved at multiple cross-connect points that must be groomed, making network performance that much more of a challenge. You can see that in order to utilize a competitive alternative for transport, we must establish and maintain a cross-connect between the collocation arrangements to access the service. Finally, even if another CLEC is able and willing to sell interoffice transport services to another CLEC, it may not be willing to do so at affordable rates.

44. As I have explained, our decision to self-deploy interoffice facilities is driven by our historical business model and plan that examined the expected demand for our services on a particular route. Advanced TelCom today, in my opinion, must expect to have at least **15 DS-3s** in traffic on any route in the near term to make constructing Interoffice LSO Access Rings economical. In my experience, other CLECs face the same hurdle. Thus, it should not be surprising that we see the construction of interoffice facilities by multiple CLECs only on the very densest traffic routes which are generally in the most urban areas. A prime example of dense traffic routes are those between two ILEC access tandems. A second example would be a route between two ILEC central offices where both offices serve very large concentrations of business lines (more than approximately 50,000 VGE business lines on each end). By contrast, not surprisingly, competitive wholesale CLEC transport products almost never are available on low traffic density routes. Thus, where the ILEC central office on either end of the route serves relatively few business lines (approximately 25,000 or less), competitive supply of interoffice transport facilities is rare.

45. We estimate that there is at least one alternative transport provider for DS-3 transport circuits available along approximately **20%** of the interoffice routes that we need. We further estimate is that there are multiple alternate DS-3 transport providers on only

approximately **5%-10%** of our routes. We are not aware of ***any*** alternate providers that offer DS-1 transport in our service areas.

46. I cannot emphasize strongly enough that the decision whether to self-provision interoffice transport facilities – and the availability of a competitive supply of such interoffice facilities – is inherently and exclusively a route-specific determination. The decision of whether to construct interoffice facilities is *route-specific* and is driven by the *density of business traffic on a particular route*. Whether there is or will be a competitive supplier of interoffice facilities is not a function of a metro area, an MSA or even a density zone. In each of those cases, you are likely to find a mix of routes where competitive supply can exist and those where it cannot. Advanced TelCom serves areas that can be considered Tier 3 and 4 markets. We have observed competitive supply of interoffice facilities to some end offices in which we have collocation facilities. but not others. For instance, we can use one other supplier to get to Eugene, Oregon from Salem, Oregon, but cannot find any competitive suppliers for routes to Grants Pass, Oregon, or Bend, Oregon. This list can be expanded, although the result will be the same: some routes do have and can support competitive suppliers of interoffice facilities, and some routes do not have and could not support competitive suppliers of interoffice facilities. Yet, small- and medium-sized business customers exist in all of the end offices and eliminating interoffice transport will severely challenge how to reach them economically.

47. Similarly, it is not sufficient to consider only the size of an ILEC end office on one end of a route. Carriers that deploy facilities must evaluate the density of traffic flowing in both directions, requiring that the offices on both ends of a route must generate substantial originating traffic to make self-deployment economic.

48. We have been able to purchase interoffice transport from other Competitive Carriers on **3 routes** or **7%** of our total system routes. The remainder of the time –

35% of our existing interoffice routes – we purchase interoffice transport from the ILECs. Simply put, our ability to deliver competitive telecommunications services to **35% of our routes** depends upon our ability to continue obtaining ILEC transport facilities on those routes at economic, cost-based rates.

VIII. ILEC SPECIAL ACCESS SERVICES ARE NOT AN ECONOMIC SUBSTITUTE FOR HIGH-CAPACITY UNE LOOPS AND TRANSPORT

49. CLECs are entitled to purchase DS-1 and DS-3 level Special Access services out of current ILEC tariffs. However, such DS-1 Special Access services commonly are priced much higher than comparable UNEs. That should not be a surprise, since entirely different standards apply to how the prices for each are established. Most Special Access services are subject to pricing flexibility and as a practical matter can be priced however high the ILECs wish to price them. By contrast, UNE prices are established by the state commissions in accordance with FCC-prescribed TELRIC costing principles. Accordingly, UNE prices are set at something approaching the cost incurred by ILECs in providing the facilities, whereas a recent MICRA study demonstrated that Special Access rates are now set sufficiently high to provide profit margins exceeding 40% on average.

50. The differential in the pricing of Special Access services as compared to UNEs is of critical importance. I have attached a chart, **Attachment 1**, which shows the price that Advanced TelCom currently pays to purchase DS-1 level Special Access (including the best negotiated volume and term arrangements currently available to us) on a state-by-state basis. As the attachment shows, Advanced TelCom commonly must pay **200 to 300%** more to purchase connections to buildings as DS-1 Special Access versus DS-1 UNEs. Indeed, the difference is as high as **1,000%**.

51. The exorbitant pricing of Special Access services has tremendous adverse and anticompetitive consequences. As I described earlier in my declaration, Advanced TelCom must purchase ILEC facilities to connect to the vast majority of our small- and medium-sized business customers. The cost of these facilities is one of the largest costs we incur in serving such customers. Given the prevalent use of ILEC loop facilities to supplement our network, all such loop costs simply must be passed through to our customers in Advanced TelCom's charges. Since, as a practical matter, we must undercut ILEC retail prices to succeed, we operate on extremely thin margins. Our current average operating margin is less than 5%. Our analysis shows that if we were required to replace DS-1 UNE loops with Special Access services across the board, this operating margin would be completely wiped out. Indeed, the price increase required to yield a profit would cause us to raise our retail prices above ILEC rate levels. This would put an immediate stop to all new sales, and our existing customer base would quickly be lost to attrition. The business model for serving small- and medium-sized businesses with ILEC facilities would simply be unsustainable.

52. Several ILECs have contended that CLECs already rely primarily on Special Access to deliver their services. I cannot speak for other CLECs, but I can report without reservation that this ILEC suggestion is untrue with respect to Advanced TelCom. To the extent that Advanced TelCom purchases DS-1 circuits from ILECs to serve our end user customers, we do so primarily through the use of UNEs, not Special Access. Indeed, only **5%** of the DS-1 circuits purchased by Advanced TelCom from the ILECs is Special Access.

53. Nonetheless, it is worth explaining why Advanced TelCom would order DS-1 Special Access from ILECs. There are several reasons. First, Advanced TelCom often has been forced to order Special Access because ILECs refused to "construct" facilities, including the installation of line cards or other minor electronic components. Verizon in particular adopted

this anticompetitive “no facilities available” policy as a means of compelling CLECs to order Special Access in place of UNEs. Second, historically ILECs were not required to combine UNEs, and consequently CLECs that wished to use ILEC facilities to serve end users out of an ILEC central office where they were not collocated were forced to order such facilities as Special Access. Even upon reinstatement of the FCC’s UNE combinations rules, the ILECs were intransigent in permitting CLECs to order such combinations. The ILECs have been similarly dilatory with regard to converting Special Access circuits to stand alone UNEs. Third, the ILECs historically prohibited commingling of access services and UNEs on the same facilities to serve an end user customer, thus posing yet another barrier to CLECs ordering UNEs. Finally, even CLECs such as Advanced TelCom provide “non-qualifying” services such as stand-alone interexchange services, and we are not permitted to order UNEs for use in providing such services.

54. The ILEC determination to drive Special Access prices through the roof should not be surprising. They know what I discussed earlier in my Declaration; *i.e.*, that Advanced TelCom and other CLECs rely upon the availability of ILEC DS-1 loop facilities to connect to customers, and that we must pass any ILEC loop charges through to our customers. Thus, if our only option is to purchase Special Access services, the ILECs can inflate our cost of service substantially — and create a classic “cost/price squeeze.” Whereas the availability of cost-based UNEs has provided CLECs an option to avoid being caught in the squeeze, the elimination of UNEs (or even the prospect of it) would provide an incentive and an opportunity for ILECs to raise Special Access prices to uneconomic levels. One must recognize that the ILECs profit more by CLECs exiting the market than they do by CLECs purchasing their Special Access services.

55. Thus, while Advanced TelCom utilizes DS-1 Special Access facilities, it does not do so by choice. We strongly prefer DS-1 UNEs and have consistently tried to order loop facilities as UNEs, and convert them to UNEs where we have been forced by ILEC restrictions to order them first as Special Access. Indeed, the evidence is clear. If Advanced TelCom were compelled to order all of its DS-1 loop facilities as Special Access, our existing integrated voice and data services offered to small- and medium-sized customers would be rendered uneconomic, and our ability to offer service to off net customers would end.

*   *   *   *

SUMMARY

52. The importance of cost-based ILEC high capacity UNE loops and transport to Advanced TelCom cannot be overstated. We rely upon them to offer service to many thousands of small and medium sized business customers. It simply is not economically feasible for Advanced TelCom to build Fiber Laterals to most buildings and self supply its own high capacity loop facilities. ILEC Special Access is not an economically feasible alternative because Special Access rates are priced far above cost already and increasing steadily. Importantly, these conditions hold true virtually universally across the nation, without regard to market or location. Thus, Advanced TelCom simply will not be able to provide competitive telecommunications services to small and medium business customers in most areas unless the FCC acts to insure that we are able to continue obtaining cost-based DS-1 UNE loops on an uninterrupted basis.

Dan J. Wigger
Vice President-Network Engineering
& Operations
Advanced TelCom, Inc.

October 1, 2004

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF REBECCA H. SOMMI
ON BEHALF OF BROADVIEW NETWORKS, INC.

I, Rebecca H. Sommi, hereby declare under penalty of perjury that the following is true and correct:

1. I am employed by Broadview Networks, Inc. ("Broadview"), as its Vice President–Operations Support. My business address is 400 Horsham Road, Horsham, PA 19044.

2. From 1982 to 1989, I held sales and marketing positions with Bell of Pennsylvania. In 1989, I joined Eastern TeleLogic Communications as Manager of Marketing, and during my tenure my responsibilities expanded to include carrier relations and regulatory responsibilities. In 1993, I was promoted to Director of Regulatory Affairs, with responsibility for negotiating interconnection agreements with Bell Atlantic on behalf of the company following adoption of the Telecom Act of 1996, and participating in 1996 Act proceedings before the Pennsylvania Public Utilities Commission. In 1999, I joined Broadview as Vice President-Operations Support. My primary job responsibilities include managing regulatory and compliance functions,

carrier relations with Verizon, vendor management (including contract negotiation and provisioning), and validation of all bills (including network and collocation costs).

3. Broadview is a facilities-based Competitive Local Exchange Carrier ("CLEC") headquartered in New York City. The company offers a complete set of telecommunications services including local and long distance voice, Internet access, Ethernet, Wavelength, Web Hosting and Integrated voice and data services. Broadview provides service to approximately **230,000** voice grade equivalent business and residential lines by means of a combination of the company's own facilities, unbundled network elements ("UNEs"), services purchased from Incumbent Local Exchange Carriers ("ILECs"), and facilities and services purchased from other competitive telecommunications carriers.

4. As a result of an acquisition and Broadview's growth in capacity requirements, it has recently begun to deploy its own fiber network consisting of a number of route-diverse OC48 rings serving four (4) of its five (5) switch sites which are located in the northeast part of the United States. Over the past five years, Broadview has built **179** collocations in Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania and Rhode Island. Of the **179 collocations** Broadview has built, only **20%** have fiber connectivity. The vast majority of Broadview's collocations require purchasing DS3 transport to route traffic back to its switch or to a node on its fiber rings. In each market, we purchase DS1 high-capacity loops and DS3 transport UNEs from ILECs to complement our own fiber optic transmission and digital switching facilities. We obtain such UNEs pursuant to local interconnection agreements and tariffs with Verizon.

I. Purpose

5. The purpose of this Declaration is to explain why the continued availability of UNE DS3 interoffice transport at TELRIC pricing is not only critical to Broadview, but necessary to sustain and promote competitive choice and support the goals of the Telecommunications Act of 1996. Additionally, I will demonstrate how Broadview builds its facilities-based network and describe the various factors that dictate Broadview's continued reliance on UNE transport, including problems we've experienced in ordering competitive transport. Lastly, I will explain why special access is not an acceptable alternative to UNE transport.

II. Fiber Deployment Preconditions

6. It is Broadview's business philosophy to rely on the ILEC as little as possible. When and where the company can economically do so, it deploys and utilizes its own network. As I've stated above, Broadview has recently begun deploying fiber optic facilities that consist of multiple route-diverse OC48 rings. There are several factors that must first be satisfied before fiber can be deployed. To economically deploy fiber, there must first be a sufficient demand for capacity. In Broadview's case, this took over **three (3) years** from the turn-up of its first facilities-based customers to cost justify deploying fiber. Capacity requirements generally must exceed **three (3) DS3s** to a collocation cage to cost justify deploying fiber to that cage. If and when capacity requirements are met, Broadview then attempts to identify a fiber vendor. Potential vendors must already be collocated in the same ILEC central office as Broadview or be willing to establish a Competitive Access Transport Terminal ("CATT") arrangement

with the ILEC in that central office. Once vendors with the prerequisite CATT arrangements are identified, the next step is to ensure that the company has access to riser in the ILEC central office to connect the CATT arrangement to Broadview's collocation. Alternatively to any CATT arrangement, if the vendor is collocated in the same central office, Broadview needs to ensure that both Broadview and the vendor have fiber terminations in its collocation. Only after all of these preconditions have been met can Broadview deploy fiber. Then, Verizon requires the submission of a new collocation application or an augment with intervals ranging from **seventy-six (76) to one-hundred-twenty (120) days**. As you can see, it is a rather lengthy and complicated formula that requires a number of factors to first be met before the formula works.

III. Alternate Vendor Qualifications

7. Broadview has always believed the only sustainable business plan for a CLEC is to deploy its own network when and where it economically and operationally can justify doing so. Minimizing reliance on the ILEC is critical to the growth and continued success of Broadview. Unfortunately, most CLECs, including Broadview, cannot simply have a "build it and they will come" mentality. When Broadview plans to enter a new market, it does so with the intention of being able to serve that market via one of its five switches. To do this, Broadview must first utilize UNE-P for customer acquisition. When a pre-determined critical mass is attained in a given wire center that cost justifies building a collocation, Broadview builds the collocation and purchases UNE DS3 transport from one of its switches or a fiber node to the collocation.

8. The DS3 transport Broadview relies on to support its proven business model is generally only available from the ILECs. However, since Broadview began building its network in 1999, we have been committed to using competitive providers of transport. Broadview has established relationships with over thirty (30) different carriers. Broadview utilizes alternate vendors wherever possible, but several problems prohibit obtaining economic transport services in an efficient manner. For numerous reasons outline below, I would estimate that Broadview is only able to obtain transport from alternate vendors **25%** of the time. This means that **75%** of the time, Broadview has no available alternative other than the ILEC.

9. The following criteria must be met when considering the purchase of dedicated transport from a competitive transport provider: (1) whether Broadview's need for transport overlaps with the availability of the transport being offered by the competitive transport provider; (2) whether Broadview's point of interconnection ("POI")/switch site is in close proximity to the competitive transport provider's network; (3) whether Broadview can justify, as an economic matter, the cost of using a competitive transport provider that will charge Broadview to extend its facilities to Broadview's POI/switch site; (4) whether Broadview can meet the minimum **$15,000 to $50,000** monthly revenue commitment to the competitive transport provider for a three to five year term agreement; and (5) whether Broadview (and Broadview's customers) can "live with" the **one-hundred-eighty (180) to two-hundred-seventy (270) day** interval required for the competitive provider to complete the build to Broadview's POI/switch site. The build interval is also subject to a number of factors beyond Broadview's or the competitive transport provider's control. For instance, it is not uncommon to encounter

difficulties with respect to gaining access to rights-of-way, determining the availability of riser and/or conduits, and building management requirements, to name a few.

10. Once the build is complete, Broadview can place its order with the alternate vendor and obtain the DS3 design information needed to place the order with the ILEC for the cross-connect from Broadview's collocation to the competitive transport provider's collocation. The ILEC requires Broadview to run its cross-connects first to the POT Bay, then to the main distribution frame, then back to the POT Bay and finally to the alternate vendor's collocation. This roundabout process to cross-connect often results in exceeding acceptable distance limitations, and thereby the quality of service is degraded to an unacceptable level. In some instances, the circuit is never provisioned because of this issue. In summary, this is just further proof that the mere presence of an alternate provider is not a sufficient standard to determine whether or not impairment exists. Other criteria besides the mere presence of an alternate provider in a central office need be considered.

11. In addition to the problems Broadview has faced as it pertains to distance limitations with cross-connects, Broadview's efforts to utilize a vendor other than the ILEC have been further frustrated by alternate vendors' capacity constraints. Broadview currently utilizes **four (4)** alternate vendors and **three (3)** fiber providers. A number of the providers have built into multiple Broadview switch sites. Frequently, when Broadview attempts to purchase lit services from an alternate provider our order is rejected due to no capacity. As a further example, in our Long Island City, New York location, Broadview worked extensively with two alternate providers to provision DS3 transport to our collocation cages. The initial review of the collocation overlay produced

a 75% match with the alternate provider. However, when Broadview placed orders, the carrier was actually able to satisfy only **20%** of Broadview's transport needs in the metro New York market. We were unable to obtain services because of the lack of DS3 capacity available for wholesale and distance limitations with cross-connects as discussed above.

12. There also seems to be an underlying belief that once a vendor has deployed fiber, there is unlimited capacity for the provisioning of services. As I discussed earlier, Broadview has begun building its own fiber and has already reached capacity on a number of its rings. It is important to note that the capacity of the fiber is limited by the electronics and the network architecture of the fiber rings, versus the fiber itself. The costs to upgrade the electronics can be substantial. As much as **$400,000** in additional expense can be incurred to upgrade an OC-48 four (4) node fiber ring to an OC-192 ring, which is a large expense that an alternate vendor may choose not to incur.

13. The bottom line is that any impairment test the Commission adopts must take the marketplace realities I have described into account. A transport test based only on the number of collocated carriers in an end office does not accurately reflect whether a CLEC is impaired on a given route. Most importantly, a route between end offices might not be impaired, but if a CLEC is unable to obtain alternate transport from its switch site and/or POI to its serving wire center (entrance facility), it is clear that the CLEC is impaired. There is no "magic number" of collocated carriers that ensures that competitively provided transport is available as a practical, economic or operational matter. Even if transport is available for some routes from that end office, transport will not be available for every route from that office.

IV. Special Access Is Not An Acceptable Alternative

14. Broadview's business model relies on certain cost assumptions for its installed base as well as the purchase of new services. Broadview has built its network and based its competitive service offerings on several cost factors, and the continued availability of UNE transport at TELRIC is paramount. TELRIC-priced transport has enabled Broadview to financially support its **179 collocations** and to provision DS0/ DS1 loop services to its end user customers. If ILECs are permitted to convert Broadview's network to special access, overall transport and DS1 loop costs would increase approximately **225%**. A finding by the FCC that UNE transport at TELRIC is no longer necessary could effectively squash competition. It is unlikely that any CLEC could absorb the additional cost of having to convert their existing base to special access. This is due largely to the exponentially higher mileage charges for special access transport. Increased mileage charges have an even greater impact on Broadview's ability to serve suburban, rural and Tier 2 cities where the average mileage on a circuit can be as high as fifteen miles. For example, the cost of UNE transport in New York for a fifteen-mile circuit would cost **$711.09** for the fixed element, **$228.15 ($15.21/mile**) for the mileage element and **$801.75** for the entrance from Broadview's switch site to the Verizon wire center where Broadview is collocated. Total for the fifteen-mile circuit is **$1740.99**. The same circuit at Verizon's special access FCC #11 pricing would cost **$825.00** for the fixed element, **$2325.45** (**$155.03/mile**) for the mileage element and **$2425.50** for the channel termination. The total for the same circuit at special access pricing is **$5575.95**, an increase of **220%** for the circuit and an unbelievable **900%** increase in the mileage element. Even if Broadview purchased its transport under

Verizon's seven-year commitment term plan, the increase for the circuit is still **92%** and more than **500%** for the mileage element.

15. Contrary to ILEC assertions, it is Broadview's belief that CLECs do not order special access for their local interconnection networks. As shown in this Declaration, special access irreparably harms Broadview's ability to cost effectively provide competitive services. Broadview rarely orders special access, nor would any other CLEC when UNEs can and should be made available. The primary reason that Broadview uses any special access is due to the ILEC denying a UNE order because of "no facilities," or due to a regulatory restriction. Since January of 2004 when Broadview first started tracking orders rejected for no facilities, Broadview has seen **29%** of its orders denied for no facilities. It is our belief that from an ILEC perspective, UNE orders rejected for no facilities that consequently are provisioned as special access are being tracked internally by the ILEC as special access and then reported as proof that CLECs are ordering special access.

V. Conclusion

16. As shown in this Declaration, Broadview believes the continued availability of UNE DS3 interoffice transport at TELRIC pricing is critical. The general unavailability of competitive alternatives in addition to the economic harm CLECs (and their customers) would incur if UNE transport costs increase to special access rates dictate the continued availability of UNE transport and demonstrate the impairment that

exists in today's market without ILEC-provided UNE transport. The Commission must consider these factors in any impairment test.

Dated: October 1, 2004

Rebecca H. Sommi
Vice President-Operations Support
Broadview Networks, Inc.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	

DECLARATION OF DAVID A. KUNDE
ESCHELON TELECOM, INC.

1. I, David A. Kunde, hereby declare under penalty of perjury that the following is my true testimony.

2. I am the Executive Vice President of Network Operations and Engineering for Eschelon Telecom, Inc. ("Eschelon") and have been employed here since 1999. From 1994 until joining Eschelon in May 1999, I held the positions of Vice President of Network Engineering and Director of Network Engineering and Operations at Citizens Communications. From 1986 to 1994, I held a variety of positions with Rochester Telephone. I have a BA in Physics and Math from Wittenberg University in Springfield, Ohio and an MBA from the University of Rochester's William E. Simon Graduate School.

3. Eschelon was founded in 1996 and is a rapidly growing provider of integrated voice, data, and Internet services. The company offers a comprehensive line of integrated telecommunications products ranging from telephone systems to advanced voice and high-speed Internet services. Eschelon employs more than **900**

telecommunications/Internet professionals and provides telecommunications services to over 35,000 business customers over more than **230,000** total access lines in **12** Tier I and II markets. Eschelon currently offers service in: Denver and Boulder, Colorado; Eugene, Oregon; Minneapolis and St. Paul, Minnesota; Phoenix, Arizona; Portland, Oregon; Reno, Nevada; Salem, Oregon; Salt Lake City, Utah; and Seattle and Tacoma, WA.

4. The purpose of my declaration is to illustrate for the Commission my company's use of and need for access to unbundled high-capacity loops and interoffice transport UNEs.

5. Eschelon commenced business in 1996 as a reseller; however, the company has migrated to a facilities-based model, providing local exchange service through our own switches and collocations in Arizona, Colorado, Minnesota, Oregon, Utah, and Washington. While we deploy our own switches and collocation, Eschelon does not self-provision its own transport facilities, but instead leases those facilities from the ILEC and alternate providers in the limited instances where that is possible.

Unbundled Interoffice Transport

6. Eschelon uses high capacity transport facilities to connect our switches to our collocation sites. To the extent that it would make economic sense, Eschelon would much prefer to build, own and operate all of the facilities involved in serving our customers, including transport. Obviously, the current capital constraints on CLECs does not support such investment at this time. However, absent the ability to build all of our own facilities, Eschelon would prefer to use alternative, non-ILEC transport providers where they are available. Unfortunately, few alternate transport providers are available, and even where such providers are available, they often do not have facilities available on

routes where we need them. This is particularly true with regard to entrance facilities, but also is true of DS-3 transport as well. In fact, a review of our data reveals that fewer than sixty percent of the Eschelon collocations can be served via alternate transport providers, and fewer than twenty percent are served by more than one alternative provider.

7. Eschelon operates predominantly in markets in which Qwest is the incumbent carrier and where third party provided dedicated transport is generally not available on a uniform, widespread, cost-effective, and timely basis. As a result, Eschelon has been compelled to purchase unbundled dedicated interoffice transport from Qwest in order to provide transport from the Eschelon switch to our collocation sites, as well as transport between Eschelon's collocations.

8. The availability of multiple dedicated transport suppliers is a critical consideration for purposes of network reliability. Eschelon's customers demand that we provide them with uninterrupted service, and doing so requires that our network have dedicated transport available from at least two different carriers, so that there is network redundancy in case of a failure.[1]

9. Although the ILECs have claimed that alternative providers of transport are available in markets wherever there is demand, in this proceeding the Commission

[1] Transport outages are all too frequent. For example, one of Eschelon's transport links between our Beard-Minneapolis collocation and our downtown Minneapolis switch failed seven times in 2002. We have experienced numerous transport outages in all of our markets almost every month, the majority of which are related to Qwest network issues. Eschelon is thus incented to use alternate carriers whenever possible due to the poor performance of ILEC transport facilities. This is not acceptable service from a provider and it is not acceptable to our small business customers. Since the events of 9/11, we should all be much more concerned to build transport diversity into the public switched telephone network.

must examine the marketplace reality that non-ILEC providers of transport are simply not yet available in many areas. In such markets, Eschelon is forced to order two different transport circuits from the same ILEC provider. In fact, despite Eschelon's best efforts to utilize alternate providers, we lack non-ILEC transport options in almost half of our **101 collocations**. Accordingly, any rule that would eliminate the ILEC's obligation to provide unbundled transport must specifically inquire as to the availability of alternate transport facilities on a route-by-route basis. Any blanket rule relying upon an MSA-wide determination of impairment would be at best arbitrary, and at worst could trigger the withdrawal of CLECs from markets where non-impairment was found.

10. While Eschelon seeks to utilize two different transport providers in each market, our ideal network would rely upon the *same two transport providers in every market and every collocation* because of the inherent difficulties we face in dealing with multiple vendors in multiple markets. Being forced to utilize multiple vendors imposes an additional layer of difficulty onto an already difficult process, and provides even more potential points of failure. Specifically, carriers are forced to negotiate multiple contracts, establish multiple ordering processes, maintain multiple points of contact, utilize multiple repair procedures, and deal with multiple billing systems. Further, utilizing multiple providers, in many instances, precludes Eschelon from being able to negotiate volume discounts with providers,[2] despite the company's attempt to

[2] Eschelon has entered into negotiations with numerous transport providers in its search for transport diversity. In Eschelon's experience, providers of wholesale transport do not offer reasonable, cost-based rates for transport until the purchaser commits to purchasing fifty or more DS-3 circuits — the equivalent capacity of 33,600 voice grade lines. Until quite recently, Eschelon's business was not sufficiently large to induce any providers to offer us cost-based rates. Only recently, Eschelon's business has grown to a scale where we can make commitments to one or two vendors per market, but no single vendor serves all

"concentrate" its purchases. It is not technically or economically feasible for Eschelon to utilize different transport providers in every market.

11. It also is not feasible for Eschelon to self-deploy its own fiber facilities as a substitute for transport provided by the ILEC. Beyond the economic irrationality of the proposition, there are other intractable impediments to self-deployment of facilities. First, existing conduits are nearly full. What limited space remains in existing conduits often is held in reserve for future use by its current occupant or owner. Second, the tolerance of municipal governments for additional street cuts – on top of years of such cuts by cable companies, electric companies, water and sewer authorities, ILECs, and CLECs – is at an all-time low. Additional digs raise the possibility of accidental disruption to existing facilities, and the possibility of disruption to municipal services. Due to these concerns and to concerns about traffic disruption, municipal governments began in the late 1990s to implement tighter controls on granting permits for access to public rights-of-way, and also began to require carriers to coordinate digs and share existing facilities already installed under the streets. Again, even if it were economically feasible for a carrier such as Eschelon to undertake large scale self-deployment of fiber facilities to substitute for transport provided by the ILEC, which it is not, these impediments would make it infeasible, as a practical matter, for Eschelon to install replacement facilities in any timely fashion, assuming such obstacles could even be overcome, which, particularly in the case of the municipal rights-of-way restrictions, is not a given.

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markets or even a high percentage of, our offices. This still requires Eschelon to maintain transport relationships with over 10 separate transport providers.

12. To the extent the Commission would use this proceeding to relieve Qwest of its obligation to unbundle dedicated transport, Eschelon would have no choice but to purchase it from Qwest's federal private line tariff, which imposes prices that are far greater than both UNE prices and the competitive transport provider prices that Eschelon pays for transport now.[3] In fact, forcing Eschelon to utilize special access would, no doubt, impose such substantial cost increases on the company that we would be forced to provide less diversity and hence offer less reliable service to our customers which in turn would cause Eschelon to lose customers, or force it to consider exiting unprofitable markets.

13. Eschelon submits that the Commission must continue to require ILECs to unbundle dedicated transport. Any impairment test the Commission adopts must take the marketplace realities I have described into account. A transport test based on the number of fiber-based collocated carriers in an end office does not accurately reflect whether a CLEC is impaired on a given route, is a poor proxy for the existence of revenue opportunities derived from self-deployment on a given route, and does not reliably indicate whether alternative sources of wholesale transport facilities may be available on a given route. Moreover, the capital market situation makes third-party providers of these elements relatively rare and, because many alternate providers companies are

[3] Qwest's FCC Tariff rates for its transport services are much higher than the rates offered by our alternative transport vendors where the latter offer service. For example, see my comparison of the five-year term rates for DS-3 transport in Colorado on Attachment 1. In addition, as the Commission is well aware, Qwest has anticipated the possibility that competitors may be forced off of UNEs and onto special access and has recently filed to raise the rates it charges competitors for special access circuits by **20% to 50%**. Qwest Corporation, Transmittal No. 206 to Tariff F.C.C. No. 1 (filed Aug 16, 2004).

struggling to stay in business, does not instill confidence in their long-term stability as suppliers of critical facilities.

Unbundled High Capacity Loops

14. Eschelon's target customers are small- and medium-sized businesses. The Regional Bell Operating Companies ("ILECs") have claimed that Competitive Local Exchange Carriers ("CLECs") do not typically target retail stores, small office buildings, schools, churches, gymnasiums, libraries, museums, hospitals, clinics, and warehouses. At Eschelon, however, we serve most of these types of establishments. In addition, Eschelon serves florists, pizza parlors and other restaurants, coffee shops, gas stations, hair salons, automobile services, funeral homes, and other small- and medium-sized businesses, even law firms. Eschelon's customers are not only located in downtown, urban areas, but also in suburban metropolitan areas. In the Minneapolis-St. Paul area, for example, Eschelon has customers in the northern suburb of Anoka, as far south as Burnsville, and as far west as Wayzata. Looking at a map of Minneapolis-St. Paul shows that this covers the breadth of the greater Minneapolis-St. Paul area. Eschelon's analog loop customers subscribe to an average of approximately 6 or 7 lines, and Eschelon's T-1 customers subscribe to an average of approximately 16 lines.

15. Approximately **24%** of our network switched local exchange lines are high capacity loops ("T-1s"). Eschelon obtains all of the facilities for those lines from the ILEC.

16. If self-provisioning and acquiring high-capacity network elements from third-party providers were realistic alternatives to ordering them from the ILECs, CLECs would have little reason to order them from ILECs. CLECs, such as Eschelon, continue

to require access to Qwest's unbundled high-capacity loops, however, because self-provisioned and third-party provided high-capacity loops are not available to serve the vast majority of our customers. Relatively few of Eschelon's customers are located in big downtown office buildings that may be "lit" by competitive facilities. Our customer base is widely dispersed throughout the greater metropolitan areas of the cities we serve.

17. Construction for self-deployment of loop facilities is a capital intensive business. We have yet to find an economic model that would justify loop facilities construction for service to a single customer, nor do we believe that such an economic model exists. A single T-1 or even DS-3 order from a customer could never economically justify such deployment by a CLEC, unless the service provider already had invested in a fiber feeder ring that was connected to certain key buildings (anchor tenants) on which long-term capacity commitments had already been made by large end user customers. If such a fiber feeder ring already existed, extension of the lateral runs to new customers would be undertaken based upon the economic calculus of revenue versus incremental investment. In any event, the vast majority of small- and medium-sized business customers do not subscribe to service levels, or for long enough term commitments, to justify fiber network expansion to their site, unless the customer happens to occupy a building with multiple other potential customers that also is close enough to an existing fiber ring. Based upon our market research, it is precisely these conditions (*i.e.*, existing fiber rings, campus environments, multi-tenant buildings, anchor tenants, etc.) that have allowed Time Warner Telecom to economically justify a certain level of fiber runs to end user customers, although we also understand there are large

users of ILEC special access services to customer locations that do not justify self-deployment of facilities.[4]

18. As to intermodal alternatives to the ILEC, in my experience cable networks are not substitutes for wireline service to small- and medium-sized businesses, as they generally do not pass and enter business customers' premises. Wireless local loop facilities exist in only the most limited of circumstances, and mobile wireless technologies are not structured to accommodate all of the varied uses that businesses require of their office telephone systems. Qwest's "last-mile facilities" or loops remain the only practical means of providing service to our customers.

19. In the end, without continued access to interoffice transport UNEs on the majority of its transport routes, and high-capacity loop UNEs everywhere Eschelon uses them or might use them, Eschelon's business would be impaired to the point of non-viability in many markets and for many of the customers to whom it provides service and to whom it targets its service offerings.

/s/ David Kunde

David Kunde
Executive Vice President of Network Operations and Engineering
Eschelon Telecom, Inc.

October 1, 2004

4 As Time Warner Telecom explained in its opposition to Qwest's proposed rate increase, "TWTC cannot efficiently deploy its own transport facilities outside of the densest metropolitan region and, even within those dense metropolitan areas, its transport network is far from ubiquitous. Moreover, TWTC can only deploy its own loops to serve customer locations with the largest telecommunications needs (and thus the largest revenue opportunities) and even these customer locations are only addressable where, among other things, building access on reasonable terms and conditions is available (as it is often not)." *Qwest Transmittal No. 206*, Petition of Time Warner Telecom To Reject, or Alternatively, Suspend and Investigate at 11 (Aug. 23, 2004).

Attachment 1
DS-3 Dedicated Transport Rate Comparison for Colorado

		Recurring			
				Qwest	
		Vendor A	Vendor B	FCC Tariff Price	
0 Mile Circuit		$ 498.37	$ 610.00	$ 1,177.50	
10 Mile Circuit		1,020.43	1,010.00	1,792.50	
Difference vs Qwest FCC Price					
0 Mile Circuit		$ (679.13)	$ (567.50)	n/a	
10 Mile Circuit		(772.08)	(782.50)	n/a	
% Difference vs Qwest FCC Price					
0 Mile Circuit		-57.7%	-48.2%	n/a	
10 Mile Circuit		-43.1%	-43.7%	n/a	
		Non-Recurring			
				Qwest	
		Vendor A	Vendor B **	FCC Tariff Price	
0 Mile Circuit		$ 266.32	$ -	$ 642.25	
10 Mile Circuit		266.32	-	642.25	
Difference vs Qwest FCC Price					
0 Mile Circuit		$ (375.94)	$ (642.25)	n/a	
10 Mile Circuit		(375.94)	(642.25)	n/a	
% Difference vs Qwest FCC Price					
0 Mile Circuit		-58.5%	-100.0%	n/a	
10 Mile Circuit		-58.5%	-100.0%	n/a	
** Vendor B waives installation charges.					

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF MIKE DUKE
ON BEHALF OF KMC TELECOM HOLDINGS, INC.

I, Mike Duke, hereby declare under penalty of perjury that the following is true and correct:

1. I am employed by KMC Telecom Holdings, Inc. ("KMC") as its Director of Government Affairs. My business address is 1755 North Brown Road, Lawrenceville, Georgia 30043. My primary job responsibilities include representing KMC's strategic business interests before federal and state regulatory agencies, and ensuring that KMC is compliant with the various rules and regulations issued by those agencies.

2. Headquartered in Bedminster, New Jersey, KMC has two distinct operating divisions. The Advanced Communications Services ("ACS") Division is a facilities-based integrated communications provider, which supports individual businesses, institutions, and government organizations with advanced Voice, Data, and Internet services in **thirty-five (35)** mid-sized cities, primarily in the mid-west and the southeast; and the Nationwide Data Services ("NDS") Division is a nationwide provider of next-generation telecommunications infrastructure and services at the network edge which provides a range of outsourcing and operations services for wireless carriers, interexchange carriers ("IXCs"), internet service providers ("ISPs"), cable

MSOs, utilities and power companies looking to enhance their service offerings or expand their geographic reach.

3. KMC's ACS division owns and operates fiber optic rings with associated switching and optronic equipment in **thirty-five (35)** metro area markets in **seventeen (17)** states. KMC has deployed a Lucent 5ESS switch in each market, plus over **2,100** local fiber SONET route miles, an average of **sixty (60)** route miles per market. ACS also has extensive collocations, with a total of **one-hundred and twenty-five (125)** Incumbent Local Exchange Carrier ("ILEC") collocations and **ninety-nine (99)** IXC collocations. ACS offers a complete set of telecommunications services including local and long distance voice, Internet access, Ethernet, Metro Dark Fiber, Web Hosting and Integrated voice and data services. Services are provided to more than 10,000 business customers by means of a combination of the company's own facilities, Unbundled Network Elements ("UNEs") and other services purchased from ILECs, and services purchased from other telecom service providers.

4. KMC operates local fiber networks in 17 states: Alabama, Florida, Georgia, Indiana, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, North Carolina, Ohio, South Carolina, Tennessee, Texas, Virginia and Wisconsin. In each area, we purchase high-capacity unbundled network element ("UNE") loop and UNE loop/transport combinations called Enhanced Extended Loops ("EELs") from ILECs to complement our own fiber optic transmission and digital switching facilities. We obtain such UNEs pursuant to local interconnection agreements with BellSouth, Qwest, SBC, Sprint and Verizon.

I. PURPOSE AND SUMMARY

5. The purpose of this Declaration is to clearly demonstrate that despite KMC's significant investment in fiber-based networks and our strong desire to extend that fiber

to as many customers as is economically feasible, KMC is still reliant on high-capacity unbundled loops and EELs purchased from the ILECs. I will first describe KMC's original business plan and our network architecture that supports that plan. I will describe how KMC utilizes DS-1 and DS-3 loop UNEs to provide last mile connectivity from our collocations to buildings served by the collocation. In Part II, I will explain how KMC decides to build its own loop facilities into buildings, and show how it normally is not feasible for KMC to construct its own wireline DS-1 and DS-3 UNE facilities. Then in Part III, I will discuss how critical the availability of economic DS-1 and DS-3 loop facilities is to KMC's ability to provide competitive telecommunications services. In Part IV, I will explain why it is critical for KMC to purchase unbundled DS-1 and DS-3 transport and loop UNE combinations ("EELs") from the ILECs to serve customers in areas where it does not make economic sense to extend our network through additional collocations. In Part V, I will explain why KMC, despite our deployment of a robust fiber network with extensive collocations, has not and cannot easily provide wholesale interoffice transport to other CLECs. And finally, in Part VI, I will explain why KMC, despite our construction of fiber laterals to certain enterprise customers, has not and cannot easily provide wholesale loops to other CLECs.

6. KMC's business model, initially formulated in 1995, was to be a true facilities-based CLEC, and to construct fiber-based networks in mid-sized cities that were underserved by the ILECs. KMC has invested over **$1.3 Billion** to construct fiber rings with over **2,100** route miles of metro fiber transport facilities in **thirty-five (35)** metropolitan areas, to deploy **35** Lucent 5ESS switches, and to establish ILEC and IXC collocations.

7. KMC's typical network architecture model used to build all of 35 networks includes deployment of robust fiber facilities, extending from KMC's switch to at least three (3) ILEC central offices collocations (the local tandem and the two central offices serving the

greatest concentration of business customers), and to collocations in at least two (2) IXC Points of Presence ("POPs"). The design of the actual route for each of our networks in each market was based on the goal of being able to potentially serve 80% of the commercial buildings in each market by either: (1) building laterals from our fiber ring directly to large enterprise customers within a maximum of 1,200 feet from our fiber backbone; or (2) via UNEs loops from our collocations.

II. BUILDING OUR OWN WIRELINE HIGH-CAPACITY LOOP FACILITIES

8. Extending our fiber networks directly to large enterprise customers is an important aspect of our business plan. However, KMC learned very early on that constructing building laterals is extremely difficult, time consuming, and costly. Before KMC can construct a fiber lateral, KMC must first negotiate municipal franchises, public and private right-of-way ("ROW") licenses, and building access agreements, which may or may not include economically feasible terms and conditions. It is difficult to balance the goals of efficient capital deployment and the timing needs of the customer given the additional time and economic constraints associated with building fiber laterals. The simple fact is that unless there is customer demand, capital expenditures can not be rationalized. While on the other hand, by the time a carrier establishes adequate customer demand, it would be difficult, or even impossible, to convince these customers to wait three (3) to six (6) months in order for KMC to build adequate facilities. This simple example makes it easy to see why in many instances the ILEC loop facilities are the only efficient route into the building, and constitute an absolute monopoly bottleneck facility.

9. Even where we can clear all of the right-of-way related hurdles discussed above, constructing a lateral to add a building to the KMC network is a formidable undertaking. Distance from our fiber ring, and how much of the lateral is aerial versus underground

(underground costs are double aerial costs), is the key variable in determining the costs for the lateral. Most buildings that are several miles from our fiber backbone, even if entirely aerial, are far too expensive to consider. Only the largest enterprise customers could justify such an investment. Buildings that are much closer can be reached, but still at a substantial cost. In addition to the cost of obtaining right-of-way and building access rights (including getting into the building and preparing space), there are substantial costs associated with the required trenching and aerial stringing, acquiring and laying conduit and fiber, and installing the requisite electronic equipment both at the KMC network node and on the customer premise. Consequently, even short laterals of a few hundred feet or less are very costly. We estimate that the average total cost of a typical building lateral is approximately **$27,000 to $30,000** per building. This figure assumes a distance of 800 to 1200 feet from the KMC backbone to the building, and assumes that 60% of the lateral is aerial and 40% is underground. It includes **$2,700** for engineering fees, **$1,000** for the fiber itself, and **$13,000** for labor and over **$10,000** to purchase the necessary electronics.

10. Importantly, in addition to the capital cost of construction, the building of laterals is very time consuming. The time required to obtain all of the necessary legal clearances and then actually construct the lateral is a minimum of 3-6 months. Customers with moderate telecommunications requirements, such as the small- and medium-sized businesses that typically utilize DS-1 level access, normally are unable and/or unwilling to wait such a long time for the delivery of services.

11. Due to the extraordinary cost of constructing laterals, KMC's current policy is not to add a building to its network unless a customer's minimum demand at that location exceeds at least **3 DS-3s** of capacity. Where we believe that customer demand could exceed the 3 DS-3 threshold, KMC utilizes a careful screening process to decide whether the investment in

lateral construction is warranted. The customer request must go through our Capital Appropriations Process as a business case to justify the expenditure of capital and ensure the achievement of sufficient financial margins to successfully obtain approval. In this process, the total costs associated with the project are compared against committed customer revenue projections to determine the financial viability of building the customer lateral. Several factors included in the detailed cost study are the cost of fiber, construction (*i.e.*, splicing, permit and building entrance fees, trenching and installation costs, and etc.), and termination and transmission equipment. In our experience, relatively few buildings survive such scrutiny, and "building adds" are the exception, not the rule. It should be obvious that it would almost never make sense to construct a lateral to add a building to the KMC network simply to add customers with DS-1 level demand.

III. HIGH CAPACITY LOOPS ARE ESSENTIAL TO KMC

12. KMC's base of more than **10,000 customers** is primarily comprised of small and medium sized businesses. Up to the 2001 timeframe, KMC pursued any and all customers in order to meet revenue covenants and to put business on our network. In recent years, KMC has shifted our focus and targeted slightly larger customers to whom KMC can sell a bundle of services provisioned over DS-1 facilities. Since 2001, virtually all of our new customers are connected to our facilities via T-1 or Integrated Access PRIs, although KMC still retains a sizeable embedded base of customers served by multiple DS-0s.

13. As mentioned previously, KMC has made significant investment in establishing collocations for the purpose of ordering DS-0, DS-1 and DS-3 UNE loops from the ILECs. KMC currently operates **125** such collocation arrangements in **35 markets** we serve. Such collocation arrangements are very costly. We estimate that KMC incurs approximately **$400,000** in costs over the first three years at each collocation. These costs include building the

collocation space, recurring charges for rent and power, plus the costs of purchasing and installing equipment to outfit the collocation space.

14. Thus, given the high cost and complexity of constructing fiber laterals to our customers, KMC relies on the availability of cost-based DS-1 and DS-3 loop UNEs to serve most of our customer base. Without access to ILEC provided DS-1 and DS-3 UNE loops priced at cost, our existing business would be crippled and future sales plans totally undermined.

V. HIGH CAPACITY LOOP AND TRANSPORT COMBINATIONS, KNOWN AS EELS, ARE A CRITICAL COMPONENT OF KMC'S NETWORK

15. Given KMC's large investment in fiber transport and collocations, KMC initially focused our sales teams to only sell to those customers within our network footprint, i.e., those customers who could be served via UNE loops from our collocations, or to whom it was economically feasible to extend our fiber to the customer premise. As KMC's reputation as an innovative service provider grew in each of our markets, we were consistently approached by customers outside our footprint to provide them service. However, there was clearly not sufficient demand to justify the additional investment to collocate in these central offices. As such, the only way to serve these customers was through ILEC Special Access facilities, the cost of which often yielded unacceptable margins. Only the very largest customers generated sufficient monthly recurring revenues to justify using Special Access facilities. The economics are such that most customers outside our network footprint cannot be economically served without the availability of EELs. It is far too expensive to extend our network to these customers through either lateral builds or additional collocations, and ILEC Special Access rates are far too expensive. Cost-based EELs are the only practical method of serving these small- to medium-sized customers.

V. IT WOULD BE VERY DIFFICULT FOR KMC TO PROVIDE WHOLESALE INTEROFFICE TRANSPORT TO OTHER CLECS

16. As mentioned previously, the KMC network is a SONET backbone architecture, in which KMC has deployed its own transport facilities and established collocations in certain ILEC and IXC central offices. KMC's transport facilities are designed and used only to carry traffic between a single ILEC (or IXC) central office and the KMC central office. Each ILEC (or IXC) collocation is connected to separate pairs of fibers, and is configured as a two-node connection, with one node at the KMC switch and the other node at the ILEC (or IXC) collocation, or interconnection point. This architecture is essentially a "spoke-and-hub arrangement," or two-point ring, that carries traffic to and from individual collocations and the KMC switch, ***but not between two collocations***. For example, fibers No. 1 and No. 2 may terminate into the ILEC local tandem and at the KMC node, but they do not terminate in any other ILEC or IXC collocation. The same would be true for fibers No. 3 and No. 4 that may terminate into ILEC collocation A, but not to any other ILEC or IXC collocation. Finally, fibers No. 5 and No. 6 could then terminate to still another ILEC central office, but not to any other ILEC or IXC collocation. This configuration establishes direct physical connectivity between the specific ILEC or IXC collocation (node 1) and the KMC central office (node 2) on a two node ring using the same transmission system. It does not establish direct connectivity or transport between two ILEC or IXC offices or collocations.

17. This network architecture was specifically designed and engineered to: (1) access unbundled network elements to extend KMC services to KMC's customers; (2) interconnect KMC and the ILEC's networks for the reciprocal exchange of traffic between the ILEC and KMC; and (3) transport traffic from the KMC switch to various PSTN, IXC, and customer interconnections. It was not designed or intended to transport traffic ***between ILEC***

collocations. As such, it was engineered and sized based on the KMC business model, which ***did not contemplate a wholesale transport or loop provisioning service***.

18. It is not operationally and economically practical for KMC to provide wholesale interoffice transport. KMC would have to undertake extensive changes to its existing network, including the redesign and upgrade of our existing transport network to become a wholesale carrier for other CLECs. There are significant costs associated with the redesign and incorporation of dedicated transport paths for this purpose. The electronics in each collocation are currently sized only to support KMC's current business model, which is limited to carrying traffic from the ILEC collocation to the KMC switch. The upgrades to our existing transport network would include increasing capacity requirements at both nodes (ILEC/IXC collocation and KMC's switch location) on each ring to accommodate wholesale interoffice transport traffic.

19. If KMC wanted to provide transport between two ILEC collocations, it would need to perform substantial upgrades to the electronics (to increase bandwidth) at all ILEC collocations and at the KMC node. In addition, the Digital Access Cross-connect System ("DACS") in the KMC switch would have to be upgraded. The DACS is a high-capacity cross connect system that merges cross connect and multiplexing functions for various purposes including the grooming of facilities. In the KMC network, the DACS directs non-switched traffic between end point destinations using various transport equipment and SONET rings. For example, under KMC's current network architecture, in order to provide transport between two ILEC central offices, the following would have to occur: (1) transport from location A, the ILEC central office, would interconnect at the location B, KMC's node (specifically at the DACS); (2) KMC's DACS would then redirect the transport to a separate fiber pair on KMC's ring at the KMC node, for transport and termination at location Z, the ILEC destination central office, and (3) the reverse would apply for traffic originating at ILEC central office Z. KMC's existing

DACS and SONET rings are not currently configured to perform the additional network functions necessary to provide this connectivity between the two ILEC collocations. The increased traffic requirement would directly impact the bandwidth requirement on the SONET ring and capacity and termination requirements on the DACS. Additional capital would be necessary to support reconfiguring the network and upgrading the transmission equipment and the DACS.

20. In addition to the substantial costs to upgrade the transmission equipment, providing wholesale transport would also drive costly expansion of space and power requirements to accommodate additional electronics in the ILEC central office collocation. First KMC would have to submit collocation augmentation applications, which would take the ILECs a minimum of **90 to 120** days to deploy and an additional **60 to 90 days** to complete the network cutover. In addition to the application fees, the ILECs would levy substantial charges for engineering, space, power, and circuit facility assignments ("CFAs"). KMC would also have to incur increased costs for network monitoring and surveillance demands. Therefore, as with a facility build, KMC would need commitments from prospective customers in order to conduct an economic feasibility study to determine if making the investment is financially prudent. KMC would not make the investments without prior commitments.

VI. KMC IS NOT OPERATIONALLY READY TO PROVIDE WHOLESALE LOOPS TO OTHER CARRIERS

21. As a practical matter, KMC is not operationally ready to provide wholesale loops to other carriers. The KMC network design is intended to transport traffic from the KMC switch to various PSTN, IXC, and customer interconnections. As such it was engineered and sized based on the KMC business model, which did not contemplate a wholesale loop provisioning service offering.

22. All of KMC's loops terminate from the customer location to the KMC node, not the ILEC central office. As such, competitive carriers that are collocated in the ILEC's central office and purchase unbundled loops today could not turn to KMC as a loop wholesale alternative, because KMC's loop facilities do not terminate in the ILEC central office and are not accessible to other carriers as a substitute for ILEC's unbundled loops.

23. If KMC were to offer wholesale loop to other carriers, it would require the redesign and upgrade of the existing transport network. As with the operational requirements necessary to upgrade KMC's network to a wholesale interoffice transport network, deployment of a wholesale loop offering would also require increased capacity requirements at both nodes on each ring and expansion of space and power to accommodate additional electronics in the ILEC central office collocation, or at a customer building.

24. At the KMC central office site, KMC would encounter space and support systems constraints. KMC central office facilities were engineered utilizing a modular "switch in a box" concept. These modular buildings were sized for the KMC business model and will not accommodate new business platforms without significant expansion. In some cases, the building growth may be subject to property sizes that preclude expansion. In addition, because KMC's loop facilities are deployed from the customer location to the KMC switch, rather than from the customer location to an ILEC collocation, KMC would also have to provide wholesale transport in order to support a competitive wholesale loop offering. KMC space and support system designs did not contemplate customer collocations at the wholesale level.

25. As with any network expansion or new product introduction, the support systems would have to grow. Network element management systems and hardware costs would increase. Network monitoring and NOC costs would increase. Provisioning and billing systems could require growth to support new offerings. New processes and procedures may be required

based on customer requirements. As with the hard costs of plant expansions, these costs are not funded without committed business.

CONCLUSION

26. The importance of cost-based ILEC high-capacity UNE loops and EELS to KMC cannot be overstated. We rely upon them to offer service to many thousands of small and medium sized business customers. It simply is not economically feasible for KMC to build laterals to most buildings and self supply its own high-capacity loop facilities. ILEC Special Access is not an economically feasible alternative because Special Access rates are priced far above cost already and increasing steadily. Thus, KMC simply will not be able to provide competitive telecommunications services to small and medium business customers in most areas unless the FCC acts to insure that we are able to continue obtaining cost-based DS-1 UNE loops and EELs on an uninterrupted basis. Nor is KMC operationally ready to provide wholesale loops or transport to other CLECs.

Mike Duke

Mike Duke
Director of Government Affairs
KMC Telecom Holdings, Inc.

October 1, 2004

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF ANTHONY ABATE
SNiP LiNK, LLC

I, Anthony Abate, pursuant to 28 U.S.C. Section 1746, do hereby declare, under penalty of perjury, that the following is true and correct:

1. I am employed by SNiP LiNK, LLC ("SNiP LiNK") as President and CTO. I have held this position since February 1996.

2. My business address is 100-A Twinbridge Drive, Pennsauken, NJ 08110.

3. SNiP LiNK is a facilities-based CLEC serving small businesses and institutional end users primarily in suburban southern New Jersey and southeastern Pennsylvania. SNiP LiNK is a privately held entity, which has five times been recognized as one of the fastest growing small businesses in the Philadelphia area.

4. The purpose of this affidavit is to explain the critical importance to SNiP LiNK of cost-based access to high capacity unbundled loops and dedicated interoffice transport UNEs. My affidavit is divided into three parts. First, I will provide a brief description of SNiP LiNK and how it uses these UNEs to provide service today. Next, I will describe SNiP LiNK's experiences in deploying a simple three-point fiber ring in its service territory. Finally, I will discuss the limited availability of transport from third parties in SNiP LiNK's market. As explained below, SNiP LiNK relies on DS-1 and DS-3 loops and transport in order to provide service to its customers. Without access to these UNEs,

SNiP LiNK would not be able to provide the service that it does today, and likely would have to exit the small- and medium-sized business marketplace in the Philadelphia area.

Description of SNiP LiNK

5. SNiP LiNK provides its customers with a full suite of bundled voice and broadband services using its own switching equipment and leased ILEC transmission facilities, principally as transport unbundled network elements ("UNEs"). SNiP LiNK provides its customer base unique service offerings not readily available from other competitive carriers or the incumbent provider. SNiP LiNK has been especially successful in bringing broadband Internet access services to school districts throughout the greater Philadelphia metropolitan area.

6. SNiP LiNK's most popular product is a converged local voice and dedicated Internet access product that allows customers to receive always-available dedicated Internet access and full-featured Centrex services over a single high-speed line, often at rates at or below the ILEC's current Centrex price. Over 50 percent of SNiP LiNK's customer base receives converged voice/data services over T-1 lines.

7. Recently, SNiP LiNK expanded its services to begin offering business and residential telecommunications services using Voice over Internet Protocol ("VoIP") technology. For business customers, SNiP LiNK's VoIP service offers dynamic bandwidth allocation over T-1 lines, enabling customers to obtain maximum efficiency in its voice and data capacity. VoIP service provides customers with a single "call me" telephone number, abbreviated dialing, unified messaging and real-time web-based call control features. SNiP LiNK provides its business VoIP services using UNE DS-1 loops and loop/transport EEL combinations.

8. For residential customers, SNiP LiNK offers the same "call me" number, unified messaging and enhanced call control features, along with unlimited nationwide calling. Residential customers must have their own broadband connection in order to receive SNiP LiNK VoIP service. As a result of this requirement, availability of SNiP LiNK's VoIP services to residential customers is limited.

Barriers to Self-Deployment of Facilities

9. As a small privately held company, SNiP LiNK does not have access to capital to construct extensive network infrastructure. SNiP LiNK is not able to construct loop facilities to any location. The barriers to deployment of loop facilities are simply too large for an entity such as SNiP LiNK to be able to construct loop facilities. I do not anticipate that SNiP LiNK would ever be able to construct its own customer loops. It will always be dependent upon third parties to provide high-capacity loops to access its customers.

10. SNiP LiNK's ability to construct facilities for transport purposes is very limited. SNiP LiNK cannot engage in "build it and they will come" network construction. Instead, SNiP LiNK must come at decisions whether to deploy transport from the opposite direction. First, it must find customers and traffic it can serve with an economical cost of transporting the traffic to SNiP LiNK's switch. Only after SNiP LiNK has generated a substantial concentration of traffic can it consider whether to use self-deployed facilities. In our experience, it would not be economical for SNiP LiNK to deploy its own transport until its needs exceeded an OC-12 of capacity. Obviously, this means that SNiP LiNK would never find it economical to deploy its own facilities to carry only a DS-1 worth of traffic, or to carry even a few DS-3s.

SNiP LiNK's Fiber Ring

11. SNiP LiNK uses three primary interconnection points in its network – one in center city Philadelphia providing access to LATA 228; one in Merchantville, NJ providing access to LATA 222 (and, through arrangements with Sprint, access to the northern Jersey and Atlantic shore LATAs); and the SNiP LiNK switch facilities in Pennsauken, NJ. Three years ago, SNiP LiNK exhausted its leased OC-12 facilities connecting these three points. After consideration of its anticipated growth and of the practical, economic and operational difficulties of the options available to it, SNiP LiNK decided to replace the leased OC-12 with an OC-48 using installed fiber or leased dark fiber obtained from third parties.

12. The fiber ring is one of the more simple rings in the industry. SNiP LiNK needed only to connect three interconnection points, all within the same geographic area. The entire length of this ring is less then 20 miles. Nevertheless, SNiP LiNK encountered numerous barriers in deploying this ring. All told, construction of this fiber ring took over **19 months** to complete and cost over **75%** more than what SNiP LiNK originally estimated for the project.

13. One principal barrier was the need to obtain rights-of-way. In order to build this ring, SNiP LiNK needed rights-of-way from three separate governmental entities. Although only three right-of-way approvals were necessary in this instance, SNiP LiNK still found that obtaining rights-of-way in New Jersey, its core market, was a very difficult process that was skewed in Verizon's favor. SNiP LiNK, as a new entrant, had to apply for right-of-way approval from each of the municipalities in which it would have fiber, even though it intended to use existing poles and conduit to install its fiber facilities. In two

municipalities, Merchantville and Pennsauken, New Jersey, SNiP LiNK's contractor had to pay fees of approximately **$2,000 for each application**. And rarely does a municipality have codified review procedures that enable SNiP LiNK to monitor application status.

14. Verizon, as the incumbent telephone utility, has blanket authority to use rights-of-way and pole attachments for building its local network without applying to the local municipalities for permission, without paying a fee, and without rules from the NJ BPU. Verizon simply does not experience the difficulties that CLECs face — it never has to apply in the first instance.

15. In addition to the cost in obtaining rights-of-way, SNiP LiNK also needed approval to attach to existing utility poles along its route. These pole attachments are obtained by submitting applications to the incumbent utility (usually Verizon) and, in many cases, approval (again) from the municipality where the pole was located. Literally hundreds of pole attachments were necessary for SNiP LiNK's simple fiber ring. At one critical time in the deployment of its network, more than **80%** of these applications had been pending for **over 11 months**. SNiP LiNK experienced substantial delays in construction because it was unable to build facilities until those applications were reviewed and approved.

16. Finally, the pole attachment process was equally rife with delay. According to information provided by the New Jersey Board of Public Utilities ("NJ BPU"), New Jersey has no formal rules to govern the manner in which pole attachments are placed. The NJ BPU states that the matters of how rights-of-way and pole attachments are managed are left to the utilities to manage as they wish. Verizon's standard pole attachment agreement contains very specific application, make-ready and construction

timelines that all licensees must follow. These intervals add literally months before a licensee is actually able to construct facilities. In fact, in many cases, construction of SNiP LiNK's facilities required another party to move its attachments on the pole, in order to maintain safety and engineering distance standards. These third parties often did not perform their work in a timely manner, and Verizon did not follow up to enforce the pole attachment rules, leaving SNiP LiNK with little ability to move its pole attachments forward. These cost increases are absolute cost disadvantages to SNiP LiNK compared to Verizon, which has complete control over its own construction, because it is the sole holder of the rights-of-way.

<u>Alternatives to ILEC Unbundled Transport Are Not Available as a Practical Matter</u>

17. SNiP LiNK must obtain transport facilities from ILECs, principally Verizon, in order to serve its customers. SNiP LiNK requires these facilities in order to carry bundled voice and broadband traffic. We have not been able to obtain the ubiquitous network build-out that we require in our markets without ILEC transport. For the reasons explained above, transport installation is made very difficult for us by the arcane rights-of-way process in many New Jersey municipalities. Third-party vendors face these same problems.

18. In connection with the construction of our fiber ring, I explored the availability of third-party transport facilities in SNiP LiNK's operating territory. Although this territory primarily encompasses the Philadelphia MSA, the fourth largest MSA in the nation, we found that wholesale alternatives for dedicated transport were very limited. By no means was transport available ubiquitously from a non-ILEC vendor. All of the providers we contacted offered wholesale service using their own facilities on only a few specific routes in the Philadelphia area. In all other locations, the wholesale vendor

would provide transport by reselling special access services from Verizon, and at rates that were comparable to Verizon special access rates.

19. We also had significant problems in obtaining services at the capacity that SNiP LiNK requested. One provider only offered dark fiber on its routes. Another only offered lit services, but refused to sell dark fiber. Still another did not provide DS1 service at wholesale; it would only offer DS3 transport. In fact, I did not find any provider that would sell DS1 transport using its own facilities.

This concludes my declaration.

Executed this 1st day of October, 2004.

Anthony Abate
SNiP LINK, LLC.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF WARREN BRASSELLE
ON BEHALF OF TALK AMERICA INC.

I, Warren Brasselle, hereby declare under penalty of perjury that the following is true and correct:

1. I am employed by Talk America Holdings, Inc. and its wholly-owned subsidiary Talk America Inc. (collectively "Talk America") as its Executive Vice President-Network Operations. My business address is 12020 Sunrise Valley Drive, Suite 250, Reston VA 20191. My primary job responsibilities include overseeing all network operations of Talk America, including provisioning, repair, and establishment of a facilities-based network to provision customers.

2. Talk America is a facilities-based Competitive Local Exchange Carrier ("CLEC"). It is based in Reston, Virginia and owns and operates switching and optronic equipment in Detroit, Michigan. The company offers a complete set of telecommunications services including local and long distance voice, Internet access, and DSL. Services are provided to more than **600,000** residential and small business customers by means of a combination of the company's own facilities, unbundled network elements ("UNEs"), services

purchased from Incumbent Local Exchange Carriers ("ILECs"), and facilities and services purchased from other competitive telecommunications carriers.

3. Talk America operates a local facilities-based network in Michigan. Specifically, in Michigan Talk America has over **300,000** customers and is in the process of building out a facilities based network to service those customers. In Detroit, we have installed a Lucent 5e switch and established **nine (9)** collocations. We predominantly purchase DS-0 loops and DS-3 transport UNEs from ILECs. We obtain such UNEs pursuant to local interconnection agreements with SBC.

I. PURPOSE AND SUMMARY

4. The purpose of this Declaration is to explain the critical importance to Talk America of interoffice transport UNEs. In Part II, I will explain why it is critical for Talk America to purchase unbundled DS-1 and DS-3 transport UNEs from the ILECs on most interoffice routes. Finally, in Part III, I will explain why resale of ILEC Special Access services cannot sustain competitive entry.

5. In this Declaration, I will explain that Talk America is transforming itself into a facilities-based CLEC that is committed to deploying its own facilities wherever such construction can be economically justified. We believe that the key to long-term success lies in the installation and use of our own facilities wherever reasonably possible. Let there be no doubt, we prefer *not* to rely upon use of the facilities of our principal competitors – the ILECs – to fill out our networks. But as was made clear by the bankruptcies experienced by most facilities-based CLECs over the past several years, constructing facilities based "on spec," where customer demand is not assured, is an unsustainable business proposition. This is especially true now, as the capital markets are simply "closed" to supporting facilities construction where

efficient near-term use is not clearly demonstrated. Thus, we simply must have access to ILEC UNE transport while we expand our networks and build our customer base.

II. TALK AMERICA DEPENDS UPON UNE INTEROFFICE TRANSPORT TO COMPLETE OUR NETWORK

6. Building backbone fiber optic transport facilities is an incredibly expensive undertaking. The costs of self-deploying transport facilities include collocation costs, the cost of fiber, the cost of physically deploying the fiber, the cost of optronics necessary to light the fiber, and the cost of obtaining the right-of-way for the fiber deployment. The optronics that must be placed in a collocation arrangement to provide interoffice transport include optical patch panels (to terminate and cross connect the fiber facility), optical multiplexers, and power distribution (*e.g.*, power filtering and fuses) equipment. Although the aggregate cost of deploying fiber for use as interoffice transport can vary substantially based upon density and topography (*i.e.*, urban construction typically is more costly than rural deployment), Talk America has found that placing fiber underground would be prohibitively expensive for a carrier that serves the mass market. We simply do not have the assurances of revenue associated with business customers who are locked into long-term contracts. Mass-market customers enjoy seamless provisioning, absence of contracts, and choice among carriers. Such factors invariably lead to customer churn, which can run between **3-7%** depending on location. Given such churn, no rational carrier would build out fiber to serve that customer base.

7. Because we lack the consistent traffic volumes required to construct our own interoffice facilities, Talk America must purchase interoffice transport facilities from other carriers. We are constantly looking for opportunities to purchase interoffice transport services from other CLECs. Of course, less than a decade into the development of local competition, no CLEC has constructed facilities on most interoffice routes in the country, and those that have

focus on the business market, not the mass market. Given the enormous time, effort and capital required, it will be many years before competitive carriers — even in the aggregate — replicate the coverage of ILEC networks. But even where CLECs have in fact self-deployed interoffice transmission facilities, that does not mean that they offer access to their networks to competing CLECs. Often times CLECs that self deploy size their networks for their own anticipated needs and simply do not have space capacity to sell to others. Other times they may have extra capacity, but do not invest in the equipment or back office required to support a wholesale offering.

8. When CLECs construct their backbone fiber networks, they initially deploy and operate an optical interface at a range of capacities. An OC-3 capacity circuit has the identical capacity as three DS-3 circuits, but the OC-3 and DS-3 circuits utilize differing technological interfaces to terminate. Thus, to offer a wholesale DS-3 service to other CLECs, a carrier must purchase, install and operate the additional electronic equipment (*i.e.*, multiplexers and de-multiplexers) required to channelize a DS-3 circuit within a larger OCn circuit, and deliver it on the DS-3 interface.

9. Even when another CLEC has a wholesale DS-3 transport offering available on a route, it must be recognized that we incur significant additional costs when we elect to use it. A third party carrier rarely (if ever) can provide all of the routes we need in a metro area. Even if another CLEC is able and willing to sell interoffice transport services to another CLEC, it may not be willing to do so at affordable rates. We generally have found that rates offered to Talk America by other CLECs are not economic unless they face competition from both the ILEC *and* other wholesale providers. We estimate is that there are multiple alternate DS-3 transport providers on only approximately **35%** of our routes. We are not aware of any alternate providers that offer DS-1 transport in our service areas.

10. As Talk America transforms itself into a facilities-based CLEC, we will strongly prefer to use our own facilities. But due to the economic realities discussed above, very often that just is not possible at this time. The truth is for none of the interoffice routes in our system can we justify self-deployment. We have been able to purchase interoffice transport from other CLECs on **30 routes** (representing **35%** of our system routes). But the remainder of the time (**65%** all of our existing interoffice routes) we simply must purchase interoffice transport from the ILECs. Simply put, our ability to deliver competitive telecommunications services depends upon our ability to continue obtaining ILEC transport facilities on those routes at economic, cost-based rates.

III. ILEC SPECIAL ACCESS SERVICES ARE NOT AN ECONOMIC SUBSTITUTE FOR ILEC TRANSPORT

11. CLECs are entitled to purchase DS-1 and DS-3 level Special Access services out of current ILEC tariffs. However, such DS-1 Special Access services commonly are priced much higher than comparable UNEs. That should not be a surprise, since entirely different standards apply to how the prices for each are established. Most Special Access services are subject to pricing flexibility and as a practical matter can be priced however high the ILECs wish. By contrast, UNEs prices are established by the state commissions and must be established in accordance with FCC-prescribed TELRIC costing principles. Accordingly, UNE prices are set at something approaching the cost incurred by ILECs in providing the facilities, while a recent MICRA study demonstrated Special Access rates are now set sufficiently high to provide profit margins exceeding **40%** on average.

12. The differential in the pricing of Special Access services as compared to UNEs is of critical importance. I have attached a chart, **Attachment A**, which shows the price

that Talk America currently pays to purchase DS-1 and DS-3 level Special Access (including the best negotiated volume and term arrangements currently available to us) in Michigan. The chart also states the amount that we currently pay for DS-3 transport UNEs in Michigan. As the attachment shows, Talk America must pay a premium of **6000% to 13000%** to purchase interoffice transport as Special Access versus DS-1 and DS-3 UNE interoffice transport, and the difference can be as high as **$2136** per DS-3.

13. The exorbitant pricing of Special Access services has tremendous adverse and anticompetitive consequences. As I described earlier in this declaration, Talk America simply must purchase ILEC transport to connect to the vast majority of our network. The cost of this transport is one of the largest costs we incur in serving customers via our own facilities. Given the prevalent use of ILEC transport to supplement our network, all such transport costs must be passed through to our customers in Talk America's charges.

14. Since, as a practical matter, we must undercut ILEC retail prices to succeed, we operate on extremely thin margins. Our current operating margin on our most popular voice services averages approximately **40%**. Our analysis shows that if we were required to replace DS-3 UNE transport with Special Access services across the board, this operating margin would be completely wiped out for our customers on our own facilities. Indeed, the price increase required to yield a profit would cause us to raise our retail prices above ILEC rate levels. This would put an immediate stop to all new sales, and our existing customer base would quickly be lost to attrition. The business model for serving residences and small businesses with ILEC facilities would simply be unsustainable. Replacing our existing UNE transport services would have similarly severe adverse consequences. We estimate that use of Special Access exclusively for interoffice transport would more than double our cost of service.

This too would usurp our ability to price our services competitively as compared to ILEC service offerings.

15. Several ILECs have contended that CLECs already rely primarily on Special Access to deliver their services. I cannot speak for other CLECs, but I can report without reservation that this ILEC suggestion is untrue with respect to Talk America, one of the nation's largest CLECs. To the extent that Talk America purchases DS-1 circuits from ILECs to serve our end user customers, we do so primarily through the use of UNEs, not Special Access. We do not have a single T-1 on Special Access that serves our end users. Similarly, less than **10%** of our DS-3 circuits have been purchased as Special Access.

16. The ILEC determination to keep Special Access prices exorbitantly high should not be surprising. They know that Talk America and other CLECs rely upon the availability of ILEC transport to connect our networks and continue to serve customers, and that we must pass any ILEC transport charges through to our customers. Thus, if our only option is to purchase Special Access services, the ILECs can inflate our cost of service substantially — and create a classic "cost/price squeeze." Whereas the availability of cost-based UNEs as an alternative has provided CLECs an option to avoid being caught in the squeeze, the elimination of UNEs (or even the prospect of it) would provide an incentive and an opportunity for ILECs to raise Special Access prices to uneconomic levels. One must recognize that the ILECs profit more by CLECs exiting the market than they do by CLECs purchasing their Special Access services.

17. Thus, while Talk America utilizes DS-3 Special Access transport, it does not do so by choice. We strongly prefer DS-3 UNE transport and have consistently tried to order

transport as UNEs. Indeed, the evidence is clear. If Talk America were compelled to order all of its DS-3 transport as Special Access, our existing integrated voice and data services offered to residential and small business customers would be rendered uneconomic, and our ability to offer service to off net customers would end.

Summary

18. The importance of cost-based ILEC transport to Talk America cannot be overstated. We rely upon unbundled transport to offer service to many thousands of residential and small business customers. It simply is not economically feasible for Talk America to self-supply its own transport through fiber or other means. ILEC Special Access is not an economically feasible alternative because Special Access rates are priced far above cost already and increasing steadily. Importantly, these conditions hold true almost universally across the nation, without regard to market or location. Thus, Talk America simply will not be able to provide competitive telecommunications services to residential and small business customers in most areas unless the FCC acts to ensure that we are able to continue obtaining cost-based transport on an uninterrupted basis.

Warren Brasselle
Executive Vice President-Network
Operations
Talk America Inc.

October 1, 2004

	A	B	C	D	E	F	G	H
1	DS-3 SPECIAL ACCESS*					UNE DS-3		
2		12 months	3 yr term	5 yr term				
3	Local Distribution Channel					Entrance Facility		
4	ZONE 1	$ 2,250	$ 1,080	$ 860		ZONE 1	$114	
5	2	$ 2,275	$ 1,090	$ 870		2	$117	
6	3	$ 2,375	$ 1,150	$ 920		3	$118	
7								
8	Channel Mileage Term							
9	ZONE 1	$ 620	$ 520	$ 420		ZONE 1	$107	
10	2	$ 650	$ 540	$ 440		2	$107	
11	3	$ 680	$ 560	$ 460		3	$107	
12								
13	Per Mile							
14	ZONE 1	$ 92	$ 56	$ 29		ZONE 1	$10	
15	2	$ 97	$ 59	$ 31		2	$10	
16	3	$ 103	$ 61	$ 33		3	$10	
17								
18						Cross Connects	$1	
19								
20	Total MRC	$ 4,410	$ 2,680	$ 1,990			$341	
21								
22	* Source: SBC/AIT FCC Tariff No. 2					DS3 Special Access v. UNE Multiplier (1, 3 & 5 yr)		
23						13	8	6
24								
25	OC-3 Special Access**					UNE OC-3		
26								
27	Local Distribution Channel	$ 1,607	$ 1,368	$ 1,050		Entrance Facility	$ 411	
28								
29	Channel Mileage Term	$ 938	$ 898	$ 750			$ 203	
30								
31	Per Mile	$ 300	$ 260	$ 210			$ 30	
32								
33	Multiplexing	$ 1,107	$ 939	$ 775				
34								
35	Total MRC	$ 7,590	$ 6,703	$ 5,425			$ 911	
36								
37	** Source: SBC/AIT FCC Tariff No. 2					OC3 Special Access v UNE Multipier (1, 3 & 5 yr)		
38						8	7	6

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF WIL TIRADO
ON BEHALF OF XO COMMUNICATIONS, INC.

I, Wil Tirado, hereby declare under penalty of perjury, that the following is true and correct:

1. I am employed by XO Communications, Inc. ("XO") as its Director of Transport Architecture. My business address is 11111 Sunset Hills Road, Reston, Virginia 20190. My primary job responsibilities include providing overall direction for the evolution of XO's network from both a technical and financial capabilities perspective. In other words, I specify what technology is deployed and how we allocate our capital funds to expand the XO network. Previously I was employed by Bell Atlantic, now part of Verizon, in a similar function.

2. Following its acquisition of Allegiance Telecom last June, XO became the nation's largest facilities-based Competitive Local Exchange Carrier ("CLEC"). Based in Reston, Virginia, XO owns and operates fiber optic rings with associated switching and fiber optic equipment that serve **70 metro area markets in 26 states**. XO now has almost **150** Class V5 circuit switches (Nortel DMS500 and Lucent 5ESS) and VoIP softswitches (Sonus). XO also has deployed **7,136** route miles of its own fiber optic facilities composed of **884,827** fiber miles of

metro fiber transport facilities. The company offers a complete set of telecommunications services including local and long distance voice, Internet access, Virtual Private Networking, Ethernet, Wavelength, Web Hosting and integrated voice and data services. Services are provided to more than **180,000 business customers** by means of a combination of the company's own facilities, Incumbent Local Exchange Carrier ("ILEC") unbundled network elements ("UNEs") and facilities and services purchased from other competitive telecommunications carriers, and through XO's Tier One Internet peering relationships. The company also is one of the nation's largest holders of fixed wireless spectrum, potentially covering **95 percent** of the population of the 30 largest U.S. cities.

I. XO PURPOSE AND SUMMARY

3. The purpose of this Declaration is to explain the critical importance to XO of DS-1 and DS-3 high-capacity unbundled loop and interoffice transport UNEs. I will describe how XO utilizes DS-1 and DS-3 loop UNEs to provide last mile connectivity to buildings passed by our SONET metro fiber optic rings. In Part II hereof, I will discuss how critical the availability of economic DS-1 and DS-3 loop facilities is to XO's ability to provide competitive telecommunications services. Then in Part III, I will explain how XO decides to build its own loop facilities into buildings, and show how it normally is not feasible for XO or other CLECs to construct their own wireline DS-1 and DS-3 UNE facilities. In Parts IV and V, I will demonstrate that wireless loop technology and cable television systems are not adequate substitutes for wireline DS-1 and DS-3 UNE loops. In Part VI, I will explain why it is critical for XO to purchase unbundled DS-1 and DS-3 transport UNEs from the ILECs on most interoffice routes. Finally, in Part VII, I will explain why resale of ILEC Special Access services cannot sustain competitive entry.

4. In this Declaration, I will explain that XO is a facilities-based CLEC that is committed to deploying its own facilities wherever such construction can be economically justified. We believe that the key to long-term success lies in the installation and use of our own facilities wherever reasonably possible. Let there be no doubt, we prefer *not* to rely upon using the facilities of our principal competitors – the ILECs – to fill out our networks. But as was made clear by the bankruptcies experienced by most facilities-based CLECs over the past several years, constructing facilities based "on spec," where customer demand is not assured, is an unsustainable business proposition. This is especially true now, as the capital markets are simply "closed" to supporting facilities construction where efficient near-term use is not clearly demonstrated. Thus, we simply must have access to high-capacity ILEC UNEs while we expand our networks and build our customer base.

II. HIGH-CAPACITY LOOPS ARE ESSENTIAL TO XO

5. XO's base of more than **180,000 customers** is primarily comprised of small and medium sized businesses. These businesses normally aggregate loops on their premises with a PBX or Key System. The vast majority of such customers (approximately 80%) subscribe to services which require that they connect to our backbone network over T-1 or Integrated Access PRI facilities. As a general matter, small and medium sized business customers are connected to the XO network with DS-1 loops, while we use higher capacity DS-3 and OCn facilities to serve large corporate users and other carriers. XO offers a suite of services (Business Trunks, ISDN PRI, Integrated Access, etc.) that are ideally suited for any small or growing company or office location with moderate bandwidth (128 Kbps to 1.024 Mbps) requirements. Such customers often elect an integrated access product, in which the customer's local, long distance and Internet access are delivered over the same loop facilities. Whenever the customer requires at least 6 lines/trunks with a minimum of 14 channels, XO provides the service via DS-1 access. Since these are by far

our most popular products with customers, we estimate that approximately **80%** of the loops used by XO to connect to our customers are at the DS-1 level.

6. From the foregoing, it is apparent that DS-1 and DS-3 level loop connectivity to customers is absolutely essential to XO's ability to deliver services to our business customers. We currently obtain these high-capacity loop facilities in a number of ways. Sometimes we build our own fiber optic facilities into a building and create a DS-1 or DS-3 channel connecting to our backbone network. Other times we purchase loop facilities from other competitive carriers. However, as I will explain later in this Declaration, the availability of those options — albeit preferred — are extremely limited. Thus, in the vast majority of instances we must rely upon the use of ILEC UNE Loops facilities to connect to customers at the DS-1 or DS-3 level.

7. The business services market is extremely competitive. We compete for customers based in large part upon our ability to provide superior service levels, new service options, route redundancy and attention to customer service. However, these service differentiating features are not sufficient to make sales unless we also are competitive on price. The bottom line is that XO is normally unable to convince customers to subscribe to its services unless it offers a lower price than the ILEC for comparable services. The need to be the low-cost alternative is a simple fact of life when you are competing against an incumbent monopoly with established brand name recognition.

8. Our business services typically are offered on very tight operating margins. Unlike the ILECs, we have no monopoly services that can be used to cross subsidize unprofitable operations elsewhere in our business. Thus, we are unable to price below cost on any of our significant service offerings and remain in business. Thus, it is imperative that we control costs,

and that critical inputs to our cost of service not exceed similar costs incurred by our primary competitors — the ILECs.

9. As I explain in Part III hereafter, it simply is not economic for XO to build its own DS-1 loop facilities. Similarly, it is not economically feasible for XO to construct DS-3 facilities unless it has at least 3 DS-3s of capacity under contract. Thus, in the vast majority of cases, we must purchase DS-1 or DS-3 loop facilities from the ILECs to serve our large base of business customers. Of course, XO is able to order such services out of the ILEC Special Access tariffs, but as I shall explain later in Part VII hereof, use of ILEC Special Access to provide local telecommunications services is not economic. Since ILEC Special Access rates are not set based on any cost-based pricing principles, and ILECs commonly build enormous profit margins into their Special Access rates, XO is simply unable to price retail services competitively when it must use ILEC Special Access services to connect to customers. Thus, we must rely upon the availability of ILEC DS-1 and DS-3 loop UNEs priced based on total element long-run incremental cost (TELRIC) costing principles to serve our customers economically. It is only when we have cost-based ILEC DS-1 and DS-3 loop facilities available that we can compete for customers based on a level economic playing field.

10. Notably, the DS-1 and DS-3 loops that we lease from ILECs are of two types. We use both UNE Loops and Enhanced Extended Links/Loops ("EELs"). In both cases, XO is required to establish collocation arrangements in ILEC central offices to obtain access to these loop facilities. XO currently operates approximately **900** such collocation arrangements in **70 markets** across the country. Such collocation arrangements are very costly. We estimate that XO incurs approximately **$500,000** over the first three years at each collocation site. These costs include building the collocation space, recurring charges for rent and power, plus the costs of purchasing and installing equipment to outfit the collocation space.

11. Thus, XO relies on the availability of cost-based DS-1 and DS-3 loop UNEs to serve most of our customer base. Without access to ILEC-provided DS-1 and DS-3 UNE loops priced at cost, our existing business would be jeopardized.

III. XO CANNOT BUILD ITS OWN WIRELINE HIGH-CAPACITY LOOP FACILITIES

12. XO is a facilities-based CLEC. We build our own fiber optic transmission networks and install our own switching equipment wherever it is economically feasible for us to do so. We have invested very heavily in constructing such network facilities. Indeed, we have spent approximately **$5 billion** to establish metro rings to serve **70 metropolitan areas**, and currently operate **146 switches** and **7,136 route miles** composed of **884,827 fiber miles** of metro fiber transport facilities.

13. Whether the service provided to customers is switched or dedicated, the loop facility is the most basic component of the network required to serve a particular customer. However, the economics of building loop facilities is fundamentally different than the economics of deploying switching and transport facilities. When XO installs switches and transport facilities, those network components are used in common (and paid for) by many customers. By contrast, a loop facility is dedicated to the use of one customer or in limited instances a very small group of customers. Given the very high cost of facilities construction, it can be financially feasible to build transport and switching facilities in areas where there is adequate aggregate potential demand in place, whereas for it to make financial sense to build loop facilities you mush have the assurance that a particular customer, or group of customers will contract with you to provide very high-capacity services over an extended period of time.

14. By way of background, when XO constructs a Metro Fiber (MF) Ring, it does so in a manner that identifies geographically proximate commercial buildings that house as

many potential customers as possible; if such customers are located in buildings that are reasonably close together, we attempt to design and build the metro ring to pass directly by as many of those buildings as possible. Buildings that are directly on XO's Metro Fiber Ring can be served with our own loop facilities. In some markets, as a result of growth or capacity issues, XO may build a smaller second fiber ring. In such cases, XO not only evaluates the building location of potential customers, but it also evaluates the buildings that house its principal existing customers in an attempt to place as many buildings on the MF Ring as possible. I have included the map of XO's San Francisco Metro Fiber Ring to illustrate this point (**Attachment A** hereto). The Metro Fiber Ring consists of interoffice fiber optic facilities deployed between XO's switch locations and the ILEC central offices, and collocation equipment installed in the ILEC central offices. Other than customers in the limited numbers of buildings on the XO MF Ring, XO serves its customers by ordering loops (UNE loops whenever available) from the XO collocation space at the ILEC central office to the end user. While XO has constructed MF Rings in most of the market areas in which we provide local exchange services, deploying MF Rings is extraordinarily expensive and thus does not occur on a consistent basis. Consequently, connection to customers via an MF Ring is the exception, not the rule, and simply is not an economic alternative for the vast majority of potential customers.

15. The final component is the Building Lateral. The vast majority of commercial buildings are NOT located on our MF Rings. Thus, if XO wishes to serve customers located in those buildings with our own loop facilities, we must construct a building "lateral," connecting the building to our MF Ring. Specifically, we must trench, install conduit, and pull fiber between the MF Ring and the building to be served; and then we must obtain and outfit equipment space in the building itself.

16. As noted, merely passing nearby a customer facility does not enable us to actually provide service to the customer. We estimate that there are 6.9 million commercial office buildings in the United States, and that around 2.3 million of those buildings are located in the cities where XO operates fiber ring. However, those 2.3 million buildings are unreachable, regardless of how close they are to the MF ring, unless they are physically connected to it. Today, our MF Rings connect to only 2,164 buildings, or **less than 1%** of the potential market.

17. The construction of laterals to connect office buildings to the XO network is extremely difficult, time consuming and costly, even when adding buildings to our MF Rings that are located in close proximity to our MF Rings. The average XO building entry is 500 feet long and on average costs **$141,000** in outside plant construction and building access plus **$79,000** for the associated electronics, totaling **$220,000 per building** assuming no significant space conditioning or internal end user wiring problems. It is important to realize that CLECs have no absolute right to build into the complexes at which customers reside. We must negotiate private Right-of-Way ("ROW") licenses and building access agreements, which may or may not be available at economic prices and depending on the location of the building. Additionally municipal franchises may need to be negotiated. Often permits are required for trenching, and sometimes rezoning is necessary, both of which are uncertain prospects. Unless these hurdles are crossed — and many times they cannot be — we simply are unable to construct that lateral regardless of customer demand or desires. For example, XO has faced recurring seasonal construction moratoriums imposed by municipalities during the winter months, construction bans in historic districts, multi-year construction bans in recently renovated city streets, building owner opposition and requirements to use city owned/operated conduit systems with limited access. In such instances, the ILEC loop facilities are the only route into the building and constitute an absolute monopoly bottleneck facility.

18. In addition to the capital cost of construction, the building of laterals is very time consuming. The time required to obtain all of the necessary legal clearances and then actually construct the lateral is a minimum of **4 to 6 months**, but can take much longer than that. Customers with moderate telecommunications requirements, such as the small- and medium-sized businesses that typically utilize DS-1 level access, normally are unable and/or unwilling to wait such a long time for the delivery of services.

19. The concerns and issues that XO has experienced in deploying its own loops are consistent with the Federal Communications Commission's (Commission's) findings in the *TRO* that competitive LECs "face extremely high economic and operational barriers" in deploying DS-1 loops. *Triennial Review Order* ¶ 325. The Commission also correctly recognized that DS-1 level customers pose significantly different economic characteristics from that of large enterprise customers and their general resistance to long term contracts. Taken together, the Commission determined that these factors make it "economically infeasible" for competitive LECs to deploy DS-1 loops. *Id*.

20. Due to the extraordinary cost of constructing laterals, XO's current policy is not to add a building to its network unless customer demand at that location exceeds at least 3 DS-3s of capacity.

The following Table 1 highlights the high cost of building laterals and that such builds are not financially justified until at least 3 DS-3 of capacity are under contract.

Table 1

Cash Flow Analysis (24-Month Present Values)

		Number of DS-3 Installs in Month 1 (no DS-3 installs in Months 2 through 24)				
		1.0	**1.5**	**2.0**	**2.5**	**3.0**
Revenue per DS-3 Per Month	$1,000	($204,900)	($197,100)	($189,300)	($181,500)	($173,600)
	$2,000	($188,300)	($172,200)	($156,100)	($140,000)	($123,900)
	$3,000	($171,700)	($147,300)	($123,000)	($98,600)	($74,200)
	$4,000	($155,200)	($122,500)	($89,800)	($57,100)	($24,500)
	$5,000	($138,600)	($97,600)	($56,700)	($15,700)	$25,300
	$6,000	($122,000)	($72,800)	($23,500)	$25,700	$75,000

- $220,000 of fiber cost (based on the average length of XO's laterals -- 500')
- NPV over 24 months

XO utilizes a careful screening process to decide whether the investment in lateral construction is warranted. A high-level estimate of construction and electronics costs is developed and used to perform an Internal Rate of Return analysis against the revenue commitment the customer is willing to make. The customer revenue commitment is defined as the Non-Recurring Charge (NRC), if any, plus the Monthly Recurring Charge (MRC) times the number of months the customer is willing to commit to by signing a term contract. Regardless of potential future revenue, no decision to build is made unless a signed customer contract is presented by the XO Sales team. In our experience, relatively few buildings survive such scrutiny, and "building adds" are the exception, not the rule. One thing can be said for sure, it would almost never make sense to construct a lateral to add a building to the XO network simply to add customers with DS-1 level demand.

21. As I explained above, it almost never is economic for XO to construct its own wireline DS-1 loop facilities. It is also worth noting that the same holds true for other CLECs as well. Numerous CLECs such as AT&T, WorldCom, Nuvox, NewSouth and KMC have said so

under oath in prior filings in these proceedings. XO's experience is consistent with these declarations. Because of limited building presence from other CLECs, we rarely have been able to purchase DS-1 and DS-3 loop facilities from other CLECs. This is true of all of our markets across the nation. Indeed, we found that CLECs offer DS-1 and DS-3 loops on a wholesale basis to **fewer than 5 percent** of the buildings that XO seeks to serve.

IV. WIRELESS TECHNOLOGY IS NOT WIDELY AVAILABLE AS A LOOP SUBSTITUTE

22. ILECs have occasionally suggested that CLECs such as XO could use fixed wireless technology to connect to their customers. However, XO's experience is that wireless loop technology suffers from technical frailties and economic problems that preclude its use as a substitute for wireline UNE loops for the vast majority of our business customers.

23. XO is one of the nation's largest holders of fixed wireless spectrum. Indeed, we have invested nearly **$1 billion** in acquiring LMDS spectrum at the 28, 31 and 39 GHz frequencies, which in combination potentially covers 95 percent of the population of the 30 largest U.S. cities. We made this investment in the hope and expectation that we eventually will be able to use fixed wireless technology as a local loop substitute, and be able to connect many customer buildings directly to our landline network.

24. XO previously tried to deploy equipment in approximately 30 markets that would enable us to use our LMDS spectrum to self provision wireless local loops between our network and customer buildings. Despite our best efforts, the roll-out was a failure. We deployed and tested equipment from four leading manufacturers and none of it performed at a level required for commercial acceptance, forcing us to abandon our initial roll-out plan. However, we continue to look for ways to use our extensive spectrum assets to reach our customers directly. Consistent

with that desire, we have been testing point-to-multipoint fixed wireless technology in San Diego and Los Angeles.

25. The results of our testing show that we have made a sound investment, and that at some indeterminate future point, wireless loops likely will be able to function as substitute for more than 5 DS-1s or DS-3 local loops in some situations. However, it is very clear that widespread commercial deployment of wireless local loops will not occur in the near future. In addition, when it does happen, the wireless local loop solution will only be useful in isolated situations that are conducive to use of the technology.

26. It is notable that the two companies that made by far the most aggressive attempt to deploy and sell fixed wireless technology and bypass loop alternatives have both failed. The two companies were Teligent and Winstar, both of which invested hundreds of millions of dollars in failed efforts to deployed fixed microwave systems. They discovered that there are very real barriers to be overcome in making fixed microwave systems commercially practical.

27. Fixed microwave systems are only useful for short haul applications. They require a direct line of sight between the customer location and the provider's network node. Moreover, signal strength fades with distance and is further attenuated by precipitation. As a consequence, microwave systems are not usable at ranges of more than 1-5 miles, depending on topography.

28. Even where these problems can be overcome, the technology can work only where impediments to antenna placement can be overcome. As did Winstar and Teligent before us, XO has experienced severe problems in obtaining the rooftop rights in commercial office buildings necessary to place the antenna equipment required to provide service. Many building

owners simply refuse to provide roof access under any conditions, while others will do so only at prices that are plainly too high for us to provide service economically. Our models require that total rooftop cost be a very small percentage of monthly revenue, or the company does not earn a reasonable return on its investment. The past industry mistakes have set an unrealistic price point in the market place. The market has also been jaded by past promises about the value of having wireless sites developed on their property. This has created a situation where many owners are unwilling to provide access or are unrealistic about the value of the access. Similarly, our attempts to negotiate access to rooftops of ILEC central offices, so that we could connect antennas with our collocation equipment, have been unsuccessful in all but three states.

29. XO is moving ahead with its development and testing of a fixed wireless access product. We remain optimistic that a fixed wireless access alternative could offer real value to customers in the future. However, it is quite evident that we remain years away from any sort of potential widespread deployment, AND that fixed wireless will not provide a connectivity solution for the foreseeable future for the majority of our customer base that uses less than 5 DS-1s of capacity. Consequently, the potential future deployment of wireless loop technology does not currently reduce our essential need for cost-based wireline DS-1 loop UNEs from the ILECs.

V. CABLE TELEVISION FACILITIES CANNOT REPLACE DS-1 AND DS-3 UNE LOOPS

30. Some ILECs have suggested that CLECs could opt to use cable television systems for alternative DS-1 and DS-3 loop facilities. In our experience, that is just ILEC rhetoric. To my knowledge, no cable television company has ever offered to provide DS-1 and DS-3 level loops to XO over their cable television plant. That should not be surprising, since cable television systems simply were not designed to provide this type of service.

31. There is a substantial geographic incongruity between the build-out plans of most cable television companies and the needs of facilities-based CLECs such as XO. Our target customers are businesses, and our fiber optic backbones are primarily routed in and around business districts. By contrast, most cable television systems were designed and built first and foremost to serve residential customers in suburban areas. Thus, commonly the cable television systems do not really reach the customers to which XO needs to connect.

32. Even where cable television networks reach our business customers, the cable television network facilities typically lack the capacity to serve large numbers of business customers that require telecommunications and Internet services at DS-1 and higher speeds. While it is true that cable television systems often have been upgraded to support the provision of cable modem services, the design of the network commonly is such to support infrequent high-speed bursts of data to and from subscribers. This is much different than a system required to support the "always on" bandwidth demands of businesses. Our sense is that cable systems normally could not provide the service availability guarantees required by our business customers.

VI. XO DEPENDS UPON UNE INTEROFFICE TRANSPORT TO COMPLETE OUR NETWORK

33. Building backbone fiber optic transport facilities is an incredibly expensive undertaking. The costs of self-deploying transport facilities include collocation costs, the cost of fiber, the cost of physically deploying the fiber, the cost of electronics necessary to light the fiber, and the cost of obtaining right-of-way for the fiber deployment. The electronics that must be placed in a collocation arrangement to provide interoffice transport include fiber distribution (to terminate and cross connect the fiber facility), digital signal cross-connect panels (to cross-connect DS-1 and DS-3 signals), optical multiplexers, and power distribution equipment (*e.g.*, power filtering and fuses). The aggregate cost of deploying fiber for use as interoffice transport can vary

substantially based upon density and topography (*i.e.,* urban construction typically is more costly than rural deployment), XO has found that placing fiber underground can cost **$400,00 to 700,000**, while placing fiber on poles can cost **$42,000** per mile. The cost to build these fiber routes is a sunk cost, since the facility cannot be moved to another location should we decide to exit a market.

34. Constructing interoffice transport fiber facilities also is very time-consuming. While fiber can be built in rural areas at rates up to several miles per day, in the urban and suburban areas where XO usually provides service, we normally can build at a daily rate of **300 to 500 feet** per day, and **100 feet** per day within the city's business district. We estimate that it normally takes approximately **6 months** to obtain the rights-of-way, apply for collocation and equipment; and it takes an additional **3 months** to actually build the fiber, and install/test the equipment. Building a collocation usually takes more than 12 months and only then can XO build fiber into the central office. This aggregate delay of more than a year provides the ILECS with significant "first mover" advantages over us.

35. Given that extraordinary cost of constructing interoffice transport facilities, it simply is not economic to build unless we have accumulated a very large volume of traffic on a particular route. Specifically, XO has found that construction does not make economic sense until we accumulate a minimum of **9 to 12 DS-3s** of traffic on that route depending on the distance. Given than we have found that self deployment is not economically rationale until we have a minimum of **9 to 12 DS-3s** of traffic on a route, obviously it would *never* be economic for XO to self-deploy interoffice transport facilities simply to provide DS-1 level transport. XO has never constructed interoffice facilities simply to self provision transport at the DS-1 level, and I cannot imagine a situation in which we could do so economically.

36. Where we lack the traffic volumes required to construct our own interoffice facilities, XO must purchase interoffice transport facilities from other carriers. We are constantly looking for opportunities to purchase interoffice transport services from other CLECs. Of course, less than a decade into the development of local competition, no CLEC has constructed facilities on most interoffice routes in the country. Given the enormous time, effort and capital required, it will be many years before competitive carriers – even in the aggregate – replicate the coverage of ILEC networks. But even where CLECs have in fact self-deployed interoffice transmission facilities, it does not mean that they offer access to their networks to competing CLECs. Often times CLECs that self deploy size their networks for their own anticipated needs and simply do not have bandwidth to sell to others. Other times they may have extra capacity, but do not invest in the equipment or back office required to support a wholesale offering. When CLECs construct their backbone fiber networks, they initially deploy and operate an optical interface at a range of capacities. An OC-3 capacity circuit has the identical capacity as three DS-3 circuits, but the OC-3 and DS-3 circuits utilize differing technological interfaces to terminate. Thus, to offer a wholesale DS-3 service to other CLECs, a carrier must purchase, install and operate the additional electronic equipment (*i.e.*, multiplexers and de-multiplexers) required to channelize a DS-3 circuit within a larger OCn circuit, and deliver it on the DS-3 interface

37. Even when another CLEC has a wholesale DS-3 transport offering available on a route, it must be recognized that we incur significant additional costs when we elect to use it. Since such a third-party carrier rarely (if ever) can provide all of the routes we need in a metro area, electing to utilize a third-party carrier requires us to incur the cost of making and managing service arrangements with multiple suppliers. For example, since most CLECs have locations different from each other within a city, XO would have to build into the third-party carrier's location in order to bring traffic to the XO switch site. In addition, service quality becomes more

difficult to maintain; maintenance and repair in particular becomes more problematic. Moreover, we must establish and maintain a cross-connect between the collocation arrangements to access the service, which costs XO on average a couple of hundred dollars per month, per fiber pair. Finally, even if another CLEC is able and willing to sell interoffice transport services to another CLEC, it may not be willing to do so at affordable rates.

38. As I have explained, our decision to self-deploy interoffice facilities is driven by the demand for our services on a particular route. XO must expect that we will have at least **9 to 12 DS-3s** in traffic on that route in the near term to make construction economic. In my experience, other CLECs face the same hurdle. Thus, it should not be surprising that we see the construction of interoffice facilities by multiple CLECs only on the very densest traffic routes. A prime example are routes between two ILEC access tandems. A second example would be a route in a Top 50 MSA market between two ILEC central offices, where both such offices serve very large concentrations of business lines (more than approximately 50,000 VGE business lines on each end). By contrast, where the ILEC central office on either end of the route serves relatively few business lines (approximately 25,000 VGE), competitive supply of interoffice transport facilities is rare.

39. I cannot emphasize strongly enough that the decision whether to self provision interoffice transport facilities – and the availability of competitive supply of such interoffice facilities – is inherently and exclusively a route-specific determination. The decision of whether to construct interoffice facilities is *route-specific* and is driven by the *density of business traffic on a particular route*. Whether there is or will be a competitive supplier of interoffice facilities is not a function of a metro area, an MSA or even a density zone. In each of those cases, you are likely to find a mix of routes where competitive supply can exist and those where it cannot.

40. XO is a facilities-based CLEC, and we strongly prefer to use our own facilities. But due to the economic realities discussed above, very often that just is not possible, thus requiring us to purchase interoffice transport from the ILECs. Simply put, our ability to deliver competitive telecommunications services depends upon our ability to continue obtaining ILEC transport facilities on those routes at economic, cost-based rates.

VII. ILEC SPECIAL ACCESS SERVICES ARE NOT AN ECONOMIC SUBSTITUTE FOR HIGH-CAPACITY UNE LOOPS AND TRANSPORT

41. CLECs are entitled to purchase DS-1 and DS-3 level Special Access services out of current ILEC tariffs. However, such DS-1 and DS-3 Special Access services commonly are priced much higher than comparable UNEs. That should not be a surprise, since entirely different standards apply to how the prices for each are established. Most Special Access services are subject to pricing flexibility and as a practical matter can be priced however high the ILECs wish to price them. By contrast, UNE prices are established by the state commissions in accordance with FCC-prescribed TELRIC costing principles. Accordingly, UNE prices are set at something approaching the cost incurred by ILECs in providing the facilities, while it is reported that the ILECs' profit margin on their Special Access service has increased on average from **8.25%** in 1996 to over **40%** at present as a result of price increases.

42. The differential in the pricing of Special Access services as compared to UNEs is a very significant factor for XO and other CLECs. I have attached a chart, **Attachment B**, which shows a variety of ILEC pricing plans currently available to XO for DS-1 and DS-3 level Special Access channel terminations in representative states. The chart also states the amount that we currently pay for DS-1 and DS-3 UNE loops in the corresponding states. As the attachment shows, even under term and volume commitment plans, XO commonly must pay **20% to 300%** more to purchase connections to buildings as DS-1 and DS-3 Special Access versus DS-1 and DS-

3 UNEs respectively. Further, term and volume commitment plans require XO to continue to purchase circuits for the **entire** period of the plan or face steep early termination penalties, thus greatly restricting XO's ability to take advantage of the best term and volume discounts offered by many ILECs. For example, if XO signs a customer up to a two year term contract for DS-1 services, but is required to purchase the underlying DS-1 circuit from the ILEC for a period of 5 years in order to get the best monthly price possible, it does not make economic sense for XO to commit to the 5-year term plan when its revenue stream to cover the cost of the circuit is only guaranteed for two years. In order to have the unrestricted ability to disconnect DS-1 and DS-3 loops and mirror its underlying end user customer commitments comparable to that enjoyed in the purchase of UNEs, XO must pay up to **600%** more for such Special Access circuits than for UNEs, as evidenced in Attachment B.

43. The exorbitant pricing of Special Access services has tremendous adverse and anticompetitive consequences. As I described above, XO simply must purchase ILEC facilities to connect to the vast majority of our business customers. The cost of these facilities is by far the largest direct cost we incur in serving such customers. Indeed, the cost of leasing a local loop for XO's various DS-1 products ranges from **54% to 93%** of our direct cost to serve our DS-1 service customers. Given the prevalent use of ILEC loop facilities to supplement our network, all such loop costs must be recovered from our customers in XO's charges. Since, as a practical matter, we must undercut ILEC retail prices to succeed, we operate on extremely thin margins. Our analysis shows that if we were required to replace DS-1 and DS-3 UNE loops with Special Access services across the board, our margin on our DS-1 and DS-3 based services would be completely wiped out. Indeed, the price increase required to yield a profit would cause us either to raise our retail prices above ILEC rate levels, a competitively unsustainable position, or more likely to abandon service where costs would not permit us to compete on price. This would make

new sales difficult if not impossible, and our existing customer base would quickly be lost to attrition. The business model for serving businesses with ILEC facilities would simply be unsustainable. Replacing our existing UNE transport services would have similarly severe adverse consequences. This too would usurp our ability to price our services competitively as compared to ILEC service offerings.

44. Several ILECs have contended that CLECs already rely primarily on Special Access to deliver their services. I cannot speak for other CLECs, but I can report without reservation that this ILEC suggestion is untrue with respect to XO, the nation's largest CLEC. To the extent that XO purchases DS-1 and DS-3 circuits from ILECs to serve our local service end user customers, we do so primarily through the use of UNEs, not Special Access. Indeed, less than 25 percent[1] of the DS-1 circuits purchased by XO from the ILECs are Special Access; conversely more than **75%** of such DS-1 loops are purchased as UNEs. Similarly, only **23%** of our DS-3 circuits have been purchased as Special Access.

45. Nonetheless, it is worth explaining why XO would order DS-1 or DS-3 Special Access from ILECs for use as local loops. There are several reasons. First, XO often has been forced to order Special Access because ILECs refused to "construct" facilities, including the installation of line cards or other minor electronic components. Verizon in particular adopted this anticompetitive "no facilities available" policy as a means of compelling CLECs to order Special Access in place of UNEs. Second, historically ILECs were not required to combine UNEs, and consequently CLECs that wished to use ILEC facilities to serve end users out of an ILEC central office where they were not collocated were forced to order such facilities as Special Access. Even

[1] The percentage of Special Access circuits does not reflect Special Access circuits that are subject to pending requests by XO that the relevant ILEC convert them to UNE pricing or disconnect them, nor does it include circuits that are required by law to be ordered as Special Access.

upon reinstatement of the FCC's UNE combinations rules, the ILECs were intransigent in permitting CLECs to order such combinations, known as EELs. Third, the ILECs have been dilatory with regard to converting Special Access circuits to stand alone UNEs. When requesting conversion from Special Access to UNE/EEL, XO has experienced endless negotiations and foot dragging, delayed conversion requests, requirements for circuits to be disconnected and reconnected, threats from the ILECs to impose exorbitant conversion charges, and overly long provisioning intervals. Fourth, we are required to order Special Access for certain circuits that are not eligible for UNE treatment (*e.g*. to order loop/transport combinations (EELs), the circuits must meet certain local usage tests under XO's interconnection agreements with most ILECs). Fifth, the ILECs historically prohibited commingling of access services and UNEs on the same facilities to serve an end user customer, thus posing yet another barrier to CLECs ordering UNEs.

46. Just to provide one example among many, XO's attempt over a 12-month period beginning in 2002 to convert more than 1000 DS-1 Special Access circuits (consisting solely of a channel termination) to UNE loops was thwarted due to BellSouth's insistence that the circuits be disconnected and reconnected, and that XO pay per-circuit conversion charges that were 30 times higher than BellSouth's allegedly "cost-based" rates for conversion of Special Access circuits consisting of a channel termination and interoffice transport to EELs.

47. XO's experience is that ILECs have continued to engage in these anti-competitive practices designed to prevent CLECs from ordering UNEs, or converting Special Access circuits to UNEs. Verizon continues to impose its "no facilities" policy on CLECs, refusing to recognize that the FCC's Routine Network Modifications ("RNM") requirements are self-effectuating, and insisting that CLECs must amend their interconnection agreements to include new RNM non-recurring charges that would double-recover costs already included in

TELRIC-based UNE rates. Similarly, notwithstanding the FCC's self-effectuating prohibition on unnecessary charges to convert Special Access to UNEs, XO continues to face ILEC imposition of such charges. For example, XO is currently embroiled in a dispute with BellSouth over that ILEC's insistence that it may impose a per-circuit charge related to conversion of DS-1 Special Access circuits to UNEs that is roughly equivalent to the non-recurring charge for the underlying Special Access circuit. In addition, many ILECs, including Verizon, continue to impose minimum monthly service commitments on all Special Access circuits so that CLECs must wait a minimum of **90 days** before converting a DS-1 Special Access circuit to UNE pricing (and a minimum of one year before converting a DS-3 Special Access circuit to UNE rates). The ILEC's processes to convert Special Access circuits to UNE's are both cumbersome and time consuming. For example, SBC, Verizon and BellSouth require that XO must place two orders (a disconnect for the existing circuit and a new circuit order) to convert a Special Access circuit to a UNE circuit. For large conversions, the conversion activities are typically coordinated as a project, and the ILEC's then commit through negotiations the number of circuits that will be worked per day. In addition, strict volume limitations restrict the number of Special Access circuits that can be converted to UNEs within a given timeframe. For example, with regard to a current XO DS-1 conversion request, Verizon will only allow XO to convert 5 to 8 circuits per LATA from Special Access to UNE pricing each day.

48. Notably, in an effort to further minimize its reliance on Special Access, XO has sought to implement the TRO's requirements regarding commingling and new EEL criteria by amending our interconnection agreements with ILECs. After failing to engage in any substantive negotiations with XO to implement a *TRO* amendment, Verizon filed for consolidated arbitrations across the country with virtually every CLEC with which it had an interconnection agreement. Shortly after the D.C. Circuit issued its *USTA II* decision in early March, Verizon determined that

it would be in its best interest to put the entire arbitration process on hold and sought abeyance orders from the relevant state commissions. XO and other CLECs opposed Verizon's abeyance motions as they related to issues unaffected by the *USTA II* decision, such as the *TRO*'s commingling, EEL certification, and RNM requirements. These CLECs requested that the affected state commissions bifurcate the arbitrations so that the parties could resolve such issues. Verizon, not surprisingly, has vehemently opposed this effort by XO and other CLECs, thus attempting to preserve further its ability to engage in anticompetitive policies that force CLECs to order and maintain high-capacity circuits as Special Access.

49. I must observe that there is no reason to believe that ILECs will reduce Special Access rates in the foreseeable future to be more closely aligned with cost-based UNE prices. Indeed, the market evidence is that the reverse is true. Over the past two months, several ILECs have filed for major, across the board increases in Special Access rates. In addition, ever since UNE rules were vacated by the D.C. Circuit last March, XO has observed reluctance by the major ILECs to negotiate meaningful commercial contracts as directed by the FCC. Thus, what we are observing in the real world is a steady increase in Special Access pricing, despite the fact that ILECs already are realizing incredible profit margins averaging **40%** or more on the service.

50. The ILEC determination to drive Special Access prices through the roof should not be surprising. They know what I discussed earlier in my Declaration, *i.e.*, that XO and other CLECs rely upon the availability of ILEC transport and high-capacity loop facilities to connect to customers, and that we must be able to recover all ILEC loop charges in our pricing to our customers. Thus, if our only option is to purchase Special Access services, the ILECs can inflate our cost of service substantially — and create a classic "cost/price squeeze." Whereas the availability of cost-based UNEs as an alternative previously provided CLECs an option to avoid

being caught in the squeeze, the elimination of UNEs (or even the prospect of it) provides an incentive and an opportunity for ILECs to raise Special Access prices to uneconomic levels. One must recognize that the ILECs profit more by CLECs exiting the market than they do by CLECs purchasing their Special Access services.

51. Finally, I understand that ILECs have suggested that pervasive use of Special Access by CMRS carriers is powerful evidence that wireline CLECs such as XO do not require the use of UNEs. The differences between the business of CMRS carriers and wireline CLECs are fundamental and too numerous to go through here. But one key distinction is worth mentioning in the context of the XO's petition. CMRS carriers do *not* use ILEC Special Access services as loop facilities to connect to end user customers. Their use of Special Access service is limited to interoffice transport, backhaul and entrance facilities. CMRS carriers use their own wireless technology to provide a "loop" connection to the end user. Thus, the experience of CMRS providers is fundamentally different, and largely irrelevant, to the question of whether XO's ability to provide service is impaired without access to cost-based ILEC UNE loops.

52. Thus, while XO utilizes DS-1 and DS-3 Special Access facilities, it does not do so by choice. We strongly prefer DS-1 and DS-3 UNEs and have consistently tried to order loop facilities as UNEs, and convert them to UNEs where we have been forced by ILEC restrictions to order them first as Special Access. Indeed, the evidence is clear. If XO were compelled to order all of its DS-1 and DS-3 loop facilities as Special Access, our existing integrated voice and data services offered to small and medium-sized customers would be rendered uneconomic, and our ability to offer service to off-net customers would end.

Summary

53. The availability of DS-1 and DS-3 UNE loops and transport is essential to XO's ability to serve many thousands of small- and medium-sized business customers. ILEC Special Access is not an economically feasible alternative because Special Access rates are priced far above cost already and increasing steadily. Importantly, these conditions hold true virtually universally across the nation, without regard to market or location. Unless the FCC quickly acts to ensure that we are able to continue obtaining cost-based DS-1 and DS-3 UNE loops and transport on an uninterrupted basis, XO — the nation's largest CLEC — simply will not be able to provide competitive telecommunications services to small and medium business customers in most areas.

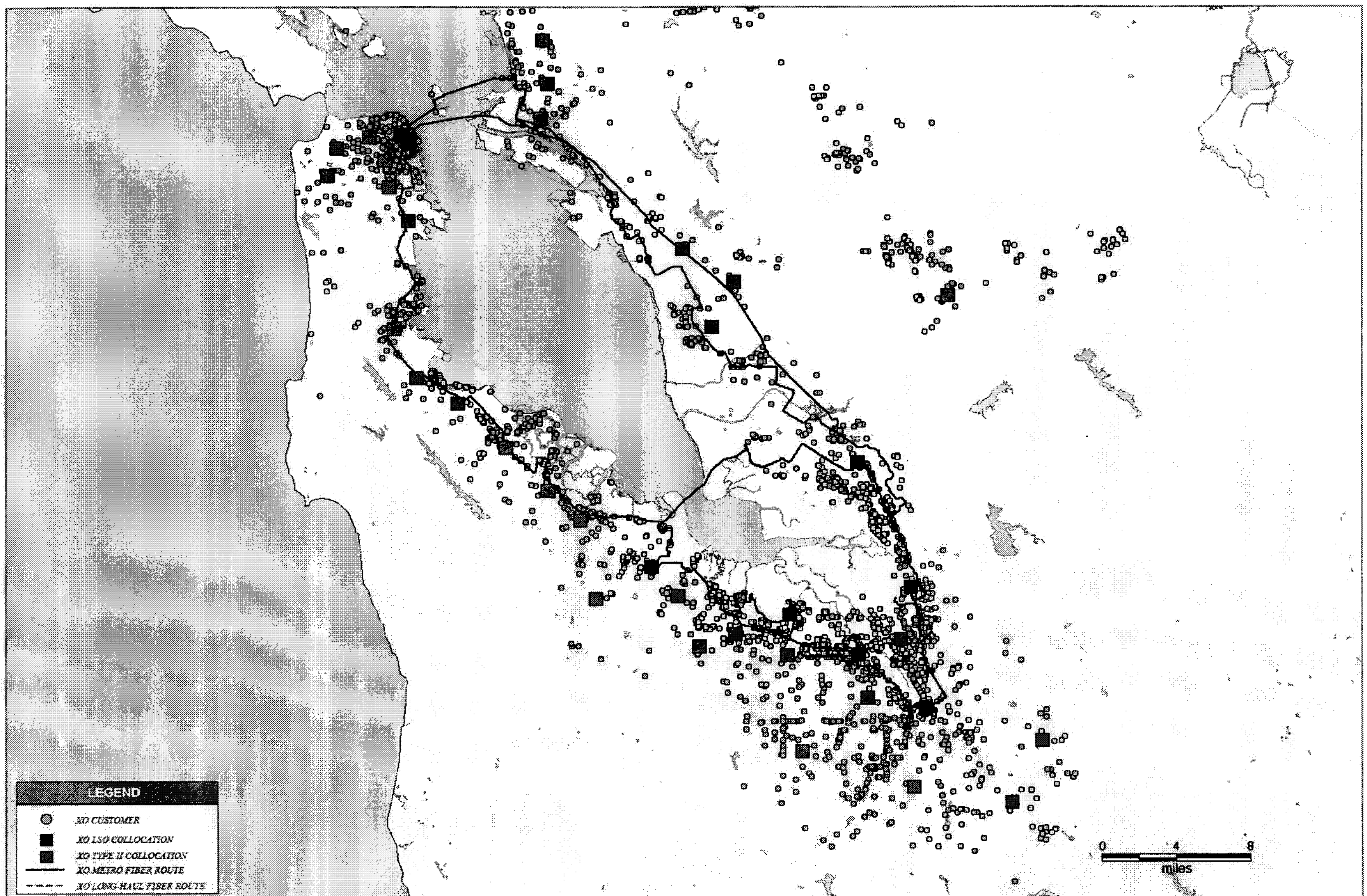
Wil Tirado
Director of Transport Architecture
XO Communications, Inc.

October 1, 2004

ATTACHMENT A

XO Communications
San Francisco

9-2004



ATTACHMENT B

DS-1 and DS-3 Examples: Special Access v. UNE Rate Comparison

		Special Access				% Special Access Greater than UNE		
RBOC	State	Month to Month	2 Year Term Plan	5 Year Term Plan	UNE	Month to Month	2 Year Term Plan	5 Year Term Plan
DS1								
Bell South	Florida	$ 168.00	$ 126.00	$ 123.00	$ 70.74	137%	78%	74%
SBC	Texas	$ 215.00	$ 145.00	$ 92.00	$ 76.96	179%	88%	20%
Verizon(East)	New York	$ 193.99	$ 184.29	$ 145.49	$ 83.50	132%	121%	74%
SBC	Illinois	$ 255.00	$ 152.00	$ 93.00	$ 61.56	314%	147%	51%
Qwest	Washington	$ 132.25	$ 120.74	$ 105.80	$ 68.86	92%	75%	54%
DS3								
Bell South	Florida	$ 2,300.00	$ 1,730.00	$ 1,580.00	$ 386.88	494%	347%	308%
SBC	Texas	$ 1,850.00	$ 1,250.00	$ 975.00	$ 665.49	178%	88%	47%
Verizon(East)	New York	$ 2,541.00	$ 2,413.95	$ 1,651.65	$ 801.75	217%	201%	106%
SBC	Illinois	$ 2,370.00	$ 2,370.00	$ 960.00	$ 335.73	606%	606%	186%
Qwest	Washington	$ 2,200.00	$ 1,700.00	$ 1,500.00	$ 745.93	195%	128%	101%

Notes:
Rates are Monthly Recurring Charge
Channel Termination rate element only
Rates are MSA Zone 1

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

DECLARATION OF JAMES C. FALVEY
ON BEHALF OF XSPEDIUS COMMUNICATIONS, LLC

I, James C. Falvey, hereby declare under penalty of perjury that the following is true and correct:

1. I am employed by Xspedius Communications, LLC ("Xspedius") as its Senior Vice President, Regulatory Affairs. My business address is 7125 Columbia Gateway Drive, Suite 200, Columbia, MD 21046. My primary job responsibilities include managing all matters that affect Xspedius before federal, state, and local regulatory agencies. I am responsible for federal regulatory and legislative matters, state regulatory proceedings and complaints, including interconnection negotiations and arbitrations, and local rights-of-way issues.

2. Xspedius provides businesses across the southern United States with innovative, facilities-based competitive local, long distance, Internet and integrated communications services. A privately held company based in O'Fallon, Missouri, Xspedius Communications offers integrated voice, data and Internet services over a network covering more than **3,400 route miles**. Xspedius competes with all four RBOCs (Qwest, BellSouth,

Verizon, and SBC), as well as Sprint (Las Vegas) and Valor (Broken Arrow, Oklahoma). Xspedius offers switched local services in twenty states and the District of Columbia.[1]

3. As of August 31, 2004, Xspedius offers services to **23,050** primarily business customers. Xspedius offers service over its own facilities, which include **3,400** route miles of fiber and **38** switches. In order to reach most of its customers, Xspedius must combine its own facilities with those leased from the incumbent local exchange carriers ("ILECs"), both unbundled network elements ("UNEs") and Special Access services. In addition, on rare occasions, Xspedius is able to identify and purchase facilities and services from other competitive telecommunications carriers.

I. PURPOSE AND SUMMARY

4. The purpose of this Declaration is to explain the critical importance to Xspedius of high-capacity unbundled loop and interoffice transport UNEs. I will describe how Xspedius utilizes DS-1 and DS-3 loop UNEs to provide last mile connectivity to buildings passed by our SONET metro fiber optic rings. In Part II hereof, I will discuss how critical the availability of economic DS-1 and DS-3 loop facilities is to Xspedius's ability to provide competitive telecommunications services. Then in Part III, I will explain how Xspedius decides to build its own loop facilities into buildings, and show how it normally is not feasible for Xspedius or other CLECs to construct their own wireline DS-1 and DS-3 UNE facilities. In addition, I will briefly discuss the fact that wireless loop technology and cable television systems are not adequate substitutes for wireline high-capacity UNE loops. In Part IV, I will explain why it is critical for Xspedius to purchase unbundled DS-1 and DS-3 transport UNEs from the ILECs

[1] Xspedius is a facilities-based competitor in the following states: **BellSouth region —** Alabama, Kentucky, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee; **Verizon Region —** Maryland, Washington, D.C., Virginia, Tampa, Florida, Irving, Texas; **SBC Region —** Texas, Missouri, Oklahoma, Kansas, and Arkansas; **Qwest Region —** New Mexico, Arizona, and Colorado; **Sprint Region —** Las Vegas, Nevada.

on most interoffice routes. Finally, in Part V, I will explain why resale of ILEC Special Access services cannot sustain competitive entry.

5. In this Declaration, I will explain that Xspedius is a true facilities-based CLEC that is committed to deploying its own facilities wherever such construction can be economically justified. We believe that the key to long-term success lies in the installation and use of our own facilities wherever reasonably possible.

6. Moreover, Xspedius would prefer ***not*** to rely upon the use of the facilities of the ILECs to fill out our networks, particularly in light of the ILECs' consistent record of provisioning delays and poor performance. For example, based upon the independent performance metrics established by the state commissions, one ILEC has paid Xspedius **$2.87M** in performance penalties since June 2002. Xspedius therefore has every incentive to find alternative facilities where they are available.

7. While Xspedius may prefer to keep its customers on its own facilities, we are also acutely aware of the financial risk posed when carriers build based upon speculative, rather than actual, demand. Xspedius purchased the assets of e.spire Communications, Inc. e.spire, originally known as American Communications Services, Inc., prided itself on building networks quickly and in the wake of the Telecom Act built "30 networks in 30 months." e.spire raised over $1.6B to build those networks and establish the company, but the eventual result for e.spire, like most major facilities-based CLECs, was Chapter 11. e.spire learned the hard way that, unlike in The Field of Dreams, "if you build it, they may ***not*** come."

8. The lesson that second-generation CLECs like Xspedius have taken from the first generation is that speculative building is not a sound financial strategy, particularly now where, in the wake of the first round of bankruptcies, capital funding is only awarded for proven performance. Accordingly, further facilities buildout must be based upon certain demand, and

each lateral or additional transport route must be cost-justified by additional customers. This means that, while facilities-based providers will eventually build out to more and more customers, the process will be a gradual one over many years. In the meantime, it is critical that cost-based UNEs continue to be available so that facilities-based carriers like Xspedius can compete with the ILECs and their ubiquitous networks.

II. HIGH-CAPACITY LOOPS ARE ESSENTIAL TO XSPEDIUS

9. Xspedius's base of **23,050 customers** is primarily comprised of small- and medium-sized businesses. The vast majority of such customers subscribe to services which require that they connect to our backbone network over T-1 facilities. As a general matter, our small- and medium-sized business customers are connected to the Xspedius network with DS-1 loops, while we use higher capacity DS-3 and OCn facilities to serve other carriers. Xspedius offers a suite of services (Business Trunks, ISDN PRI, Integrated Access, etc.) that are ideally suited for any small or growing company or office location with moderate bandwidth (128 Kbps to 1.024 Mbps) requirements. Such customers often choose an integrated access product, in which the customer's local, long-distance and Internet access are delivered over the same loop facilities. Whenever the customer requires approximately 8 lines, Xspedius provides the service via T-1 access. Given that we serve small- and medium-sized business customers, a substantial majority of our access lines are delivered to customers over T-1 or higher facilities.

10. From the foregoing, it is apparent that DS-1 and DS-3 level loop connectivity to customers is absolutely essential to Xspedius' ability to deliver services to our small- and medium-sized business customers. We currently obtain these high-capacity loop facilities in a number of ways. Sometimes, where justified by substantial demand, we build our own fiber optic facilities into a building and create a DS-1 or DS-3 channel connecting to our backbone network. Other times we purchase loop facilities from other competitive carriers.

However, as I will explain later in this Declaration, the availability of those options — albeit preferred — are extremely limited. Consequently, Xspedius is highly dependent upon ILEC UNE facilities to deliver service to its customers. In fact, Xspedius has over **11,000** UNE T-1 loops and Enhanced Extended Links/Loops ("EELs"), and close to an additional **5,000** Special Access T-1s in place today. Of those Special Access T-1s, some are eligible for conversions, some we tried to order as UNEs/EELs but were rejected by the ILECs, and many are in markets like Tampa, Florida where "cost-based" UNE prices remain at the same level as retail Special Access.

11. The market for our business services is extremely competitive. We compete for customers based in large part upon our ability to provide superior service levels, new service options, route redundancy, and attention to customer service. However, these service-differentiating features are not sufficient to make sales unless we also are competitive on price. The bottom line is that Xspedius is normally unable to convince customers to subscribe to its services unless it offers a lower price than the ILEC for comparable services. Xspedius, like other CLECs, needs to be the low-cost alternative in order to compete with the well-established incumbents.

12. Unlike the ILECs, we have no monopoly services which can be used to cross-subsidize unprofitable operations elsewhere in our business. Thus, we are unable to price below cost on any of our significant service offerings and remain in business. Thus, it is critical that we control costs, and that critical inputs to our cost of service not exceed similar costs incurred by our primary competitors — the ILECs.

13. As I explain in Part III hereafter, it simply is not economic for Xspedius to build its own DS-1 loop facilities. Similarly, construction of DS-3 facilities is almost never justified below the OCn (3 DS-3s) level. Thus, in the vast majority of cases, we must purchase

DS-1 or DS-3 loop facilities from the ILECs to serve our large base of small- and medium-sized business customers. Of course, Xspedius is able to order such services out of the ILEC Special Access tariffs, but as I shall explain later in Part V hereof, use of ILEC Special Access to provide local telecommunications services is not economic. Since ILEC Special Access rates are not set based on any cost-based pricing principles, and ILECs commonly build substantial profit margins into their Special Access rates, Xspedius is simply unable to price retail services competitively when it must use ILEC Special Access services to connect to customers. Thus, we must rely upon the availability of ILEC high-capacity loop UNEs priced based on TELRIC costing principles to serve our customers economically. It is only when we have cost-based DS-1 and DS-3 loop facilities available that we can compete for small- and medium-sized business customers based on a comparable cost structure for the critical inputs of loops and transport.

14. As mentioned above, the T-1 loops that we lease from ILECs are of two types. We use both UNE Loops and EELs. In both cases, Xspedius is required to establish collocation arrangements in ILEC central offices to obtain access to DS-1 loop facilities. Xspedius currently operates **214** such collocation arrangements across the country. Such collocation arrangements are very costly. We estimate that Xspedius incurs approximately **$150,000 to $200,000** in the first year alone to establish ***a single collocation site***. These costs include building the collocation space, recurring charges for rent and power, plus the costs of purchasing and installing equipment to outfit the collocation space.

15. Largely due to the cost of collocation, Xspedius normally cannot economically serve customers with our own switches unless those customers have sufficient demand to warrant the use of a DS-1 level loop. We generally figure that it is not economic for Xspedius to serve customers over DS-1 loops that use less than 8 lines.

16. Thus, Xspedius relies on the availability of cost-based DS-1 and DS-3 loop UNEs to serve a substantial portion of our access lines (over 11,000 UNEs, each with anywhere from 8 to 23 lines). Again, there are over 16,000 T-1s when you count Special Access, and many of them would not be on Special Access if not for exorbitant UNE pricing in some markets, or the complex commingling and EEL usage restriction rules that the FCC has itself recognized to be Byzantine and has replaced them with simpler, more manageable rules. When new EEL restrictions go into effect and better UNE pricing becomes available in certain markets, an even higher percentage of the Xspedius T-1 inventory will be purchased as UNE/EELs. In the end, Xspedius purchases approximately 11,000 UNE T-1s to serve about 23,000 customers. But recognize that included in the 23,000 customers are over 4,000 UNE-P customers, as well as resale, analog line, and other customers who would not need T-1 service. The reliance on ILEC UNEs to serve its foundational T-1 customer base then is substantial, particularly once Xspedius replaces more of its current Special Access.

17. Without access to ILEC-provided DS-1 and DS-3 UNE loops priced at TELRIC, our existing business would be severely harmed, and future sales against the ILECs extremely difficult to pursue.

III. XSPEDIUS CANNOT BUILD ITS OWN WIRELINE HIGH-CAPACITY LOOP FACILITIES

18. Xspedius is a facilities-based CLEC. We build our own fiber optic transmission networks and install our own switching equipment wherever it is economically feasible for us to do so. We currently operate **38** switches, **3,400** route miles of fiber transport facilities, and **214** collocations.

19. Whether the service provided to customers is switched or dedicated, the loop facility is the most basic component of the network required to serve a particular customer. However, the economics of building loop facilities is fundamentally different than the economics

of deploying switching and transport facilities. When Xspedius installs switches and transport facilities, those network components are used in common (and paid for) by many customers. By contrast, loop facilities are dedicated to the use of one customer, or a very small group of customers. Given the very high cost of facilities construction, it can be sensible to build transport and switching facilities in areas where there is adequate aggregate potential demand in place, whereas it normally makes sense to build loop facilities only where you have assurance that a particular customer or group of customers will contract with you to provide very high-capacity services over an extended period of time.

20. By way of background, when Xspedius constructs a local fiber network, the system is comprised of interconnected sets of transmission facilities built as rings. Xspedius networks are often made of a series of fiber optic rings connecting critical hand-off points such as ILEC tandem offices and interexchange carrier points of presence. Some effort is also made to bypass concentration of buildings. However, because the rings are primarily designed to provide transport, the buildings are an afterthought. Xspedius can then activate or light fiber circuits within those rings to connect a carrier to certain points of presence on the ring. Where Xspedius has access to a building – and Xspedius has in the range of 600 lit buildings – it could light a circuit to create a fiber ring for an end user customer as well. As it is, 600 buildings across 20 states and the District of Columbia is not a serious concentration of building access. Moreover, the opportunities to bring customers "on-net" in this manner are even further limited. As demonstrated by the record in the state proceedings, the majority of the Xspedius lit buildings are for ***carrier*** access (*e.g.*, LEC wire centers, IXC POPs, and carrier hotels) and are not sites for potential end user customers. That's why – despite all its fiber route miles, Class 5 switches, collocations, and high-tech equipment — Xspedius still purchases so much of its T-1 customer access directly from the ILECs.

21. The reason Xspedius has so few lit buildings is that building transmission facilities — called "laterals" — from our ring to a new building is an expensive proposition. Xspedius estimates that, depending upon local market conditions, it can cost anywhere from **$21 to $40** per foot (which translates to **$110,880 to $211,200** per mile) to construct a lateral. As noted, merely passing nearby a customer facility does not enable us to actually provide service to the customer. The cost of building laterals alone has limited the number of buildings to which we have access to approximately 600. Once the physical barriers are cleared, there are also the practical difficulties of gaining reasonable building access agreements from landlords, a further hurdle that can eliminate buildings from the list of prospective targets or increase the costs of entering a building such that it becomes difficult to compete with the ILEC's free access.

22. The construction of laterals to connect office buildings to the Xspedius network is extremely difficult, time-consuming, and costly. It is important to realize that CLECs have no absolute right to build into the complexes at which customers reside. In addition to building access agreements, we must negotiate municipal franchises and private Right-of-Way ("ROW") licenses. Xspedius routinely runs up against municipal franchises that are discriminatory vis à vis the ILECs and where the cities demand non-cost-based fees, contrary to the requirements of Section 253 of the Telecom Act. In some markets, per-foot franchise fees are prohibitively expensive — and more so for carriers like Xspedius who have invested in thousands of miles of facilities than for mere resellers or "Smart" build providers who have not contributed to the facilities-based competition that is ostensibly favored by the policymakers. The cost of litigating against the cities is itself daunting. Over the years Xspedius and its predecessor e.spire have spent hundreds of thousands of dollars — in Tennessee, Arizona, and Maryland — to litigate blatantly discriminatory franchise regimes, as well as extensive additional dollars attempting to negotiate away patently illegal franchise requirements. Where

these direct costs and other costly obstacles prove to be prohibitive, the ILEC loop facilities are the only route into the building, and constitute a bottleneck facility.

23. Even where we can clear all of the right-of-way related hurdles discussed above, building a lateral to add a building to the Xspedius network is a formidable undertaking. Reaching a building more than 1 mile from our fiber backbone, given the per-foot costs discussed above — which are just the trenching costs alone — cannot even be considered. Buildings that are much closer can be reached, but only at the substantial cost noted above. In addition to the cost of obtaining right-of-way, building access rights, and trenching costs, there are other substantial costs associated with installing the requisite electronic equipment at both the Xspedius network node and on the customer premise. Consequently, even short laterals of a few hundred feet or less are very costly.

24. Importantly, in addition to the capital cost of construction, the building of laterals is very time consuming. The time required to obtain all of the necessary legal clearances and then actually construct the lateral is a minimum of **10 to 12 months**, but can often take much longer than that. This includes time for planning, getting permits, construction, and installation of equipment. Customers with moderate telecommunications requirements, such as the small- and medium-sized businesses that typically utilize DS-1 level access, normally are unable or unwilling to wait such a long time for the delivery of services. They fully and rightfully expect the routine turn-up intervals which they are accustomed to receiving from the ILECs. After all, signing up for phone service is not expected to be a year-long endeavor like buying a house or a new car.

25. Due to the extraordinary cost of constructing laterals, Xspedius's current policy is not to add a building to its network unless customer demand at that location exceeds at least **3 DS-3s** of capacity — at an absolute minimum. Where we believe that customer demand

could exceed the 3 DS-3 threshold, Xspedius utilizes a further screening process to decide whether the investment in lateral construction is warranted. In our experience, relatively few buildings survive such scrutiny, and "building adds" are the exception, not the rule. One thing can be said for sure, it would almost never make sense to construct a lateral to add a building to the Xspedius network simply to add customers with DS-1 level demand.

26. As I explained above, it almost never is economic for Xspedius to construct its own wireline DS-1 loop facilities. Neither does it make sense to construct DS-3 loop facilities when customer demand is for less than OCn capacity. This is consistent with our experience as a purchaser of circuits. Xspedius rarely would be able to purchase DS-1 loop facilities from other CLECs. This is true of all of our markets across the nation.

27. In addition, alternative technologies are not realistic alternatives for Xspedius to purchase loop access. Xspedius has never successfully utilized wireless loops as once offered by carriers like Winstar, Teligent, and ART. Wireless loops have always been a marginal offering to a limited number of buildings, and Xspedius has not entrusted its customers to wireless offerings. Most customers come to Xspedius for the reliability of a landline T-1 connection, and Xspedius cannot afford to downgrade its quality of service through wireless offerings. Similarly, Xspedius has not experimented with cable loops. Even if they were available in the right geographic locations, which they often are not, cable would not offer the reliability and throughput of a typical Xspedius T-1 connection.

IV. XSPEDIUS DEPENDS UPON UNE INTEROFFICE TRANSPORT TO COMPLETE OUR NETWORK

28. Building backbone fiber optic transport facilities is an incredibly expensive undertaking. The costs of self-deploying transport facilities include collocation costs, the cost of fiber, the cost of physically deploying the fiber, the cost of optronics necessary to

light the fiber, and the cost of obtaining right-of-way for the fiber deployment. The optronics that must be placed in a collocation arrangement to provide interoffice transport include optical path panels (to terminate and cross connect the fiber facility), optical multiplexers, and power distribution (*e.g.*, power filtering and fuses) equipment. Although the aggregate cost of deploying fiber for use as interoffice transport can vary substantially based upon density and topography (*i.e.*, urban construction typically is more costly than rural deployment), Xspedius has found that placing fiber underground can cost anywhere from **$110,880 to $211,200 per mile** to trench. Transport costs are sunk costs, because the facility cannot be moved to another location should we decide to exit a market. Given the extraordinary cost of constructing interoffice transport facilities, it simply is not economic to build unless we have accumulated a very large volume of traffic on a particular route.

29. Obviously, given the excessive cost of deploying fiber, it would ***never*** be economic for Xspedius to self-deploy interoffice transport facilities to provide only DS-1 level transport. Xspedius has ***never*** constructed interoffice facilities to self-provision transport at the DS-1 level, and I cannot imagine a situation in which we could do so economically.

30. Where we lack the traffic volumes required to construct our own interoffice facilities, Xspedius must purchase interoffice transport facilities from other carriers. We are constantly looking for opportunities to purchase interoffice transport services from other CLECs. Of course, less than a decade into the development of local competition, most interoffice routes in the country are not occupied by a single CLEC. Given the enormous time, effort and capital required, as discussed at length above in the context of laterals, it will be many years before competitive carriers – even in the aggregate – replicate the coverage of ILEC networks. But even where CLECs have in fact self-deployed interoffice transmission facilities, that does not mean that they offer access to their networks to competing CLECs. Often, CLECs

that self-deploy will size their networks for their own anticipated needs and simply do not have spare capacity to sell to others. Other times they may have extra capacity, but do not invest in the equipment or back office required to support a wholesale offering. Establishing the back office and dealing with the constant roadblocks involved in serving their own customer base is much more than a full time job. When CLECs construct their backbone fiber networks, they initially deploy and operate an optical interface at a range of capacities. An OC-3 capacity circuit has the identical capacity as 3 DS-3 circuits, but the OC-3 and DS-3 circuits utilize differing technological interfaces to terminate. Thus, to offer a wholesale DS-3 service to other CLECs, a carrier must purchase, install and operate the additional electronic equipment (*i.e.*, multiplexers and de-multiplexers) required to channelize a DS-3 circuit within a larger OCn circuit, and deliver it on the DS-3 interface.

31. Even when another CLEC has a wholesale DS-3 transport offering available on a route, it must be recognized that we incur significant additional costs when we elect to use it. Since such a third-party carrier rarely (if ever) can provide all of the routes we need in a metro area, electing to utilize a third-party carrier requires us to incur the cost of making and managing service arrangements with multiple suppliers. In addition, service quality becomes more difficult to maintain; maintenance and repair in particular becomes more problematic. Moreover, we must establish and maintain a cross-connect between the collocation arrangements to access the service, assuming we share a collocation in the same office. Historically, there have been many ILEC roadblocks to establishing such cross-connects. Interconnection agreements are often just now being amended to permit such cross-connects, and whether they will be available in a seamless manner in real-world application remains to be seen.

32. I cannot emphasize strongly enough that the decision whether to self-provision interoffice transport facilities – and the availability of a competitive supply of such

interoffice facilities – is inherently and exclusively a route-specific determination. The decision of whether to construct interoffice facilities is *route-specific* and is driven by the *density of business traffic on a particular route*. Whether there is or will be a competitive supplier of interoffice facilities is not a function of a metro area, an MSA or even a density zone. In each of those cases, you are likely to find a mix of routes where competitive supply can exist and those where it cannot.

33. Similarly, it is not sufficient to consider only the size of an ILEC end office on ***one end*** of a route. Carriers that deploy facilities must evaluate the density of traffic flowing in both directions, requiring that the offices on ***both ends*** of a route must generate substantial originating traffic to make self-deployment economic.

V. ILEC SPECIAL ACCESS SERVICES ARE NOT AN ECONOMIC SUBSTITUTE FOR HIGH-CAPACITY UNE LOOPS AND TRANSPORT

34. CLECs are entitled to purchase DS-1 and DS-3 level Special Access services out of current ILEC tariffs. However, such DS-1 Special Access services commonly are priced much higher than comparable UNEs. That should not be a surprise, since entirely different standards apply to how the prices for each are established. Most Special Access services are subject to pricing flexibility and as a practical matter can be priced however high the ILECs wish to price them. By contrast, UNEs prices are established by the state commissions in accordance with FCC-prescribed TELRIC costing principles. Accordingly, UNE prices are set at something approaching the cost incurred by ILECs in providing the facilities, whereas a recent MICRA study demonstrated Special Access rates are now set sufficiently high to provide profit margins exceeding 40% on average.

35. The differential in the pricing of Special Access services as compared to UNEs is of critical importance. The exorbitant pricing of Special Access services has

tremendous adverse and anticompetitive consequences. As I described earlier in my Declaration, Xspedius must purchase ILEC facilities to connect to the vast majority of our small- and medium-sized business customers. The cost of these facilities is one of the largest costs we incur in serving such customers. Given the prevalent use of ILEC loop facilities to supplement our network, all such loop costs simply must be passed through to our customers in Xspedius' retail charges. Replacing our existing UNE transport services would similarly have severe adverse consequences.

36. Several ILECs have contended that CLECs already rely primarily on Special Access to deliver their services. I cannot speak for other CLECs, but I can report without reservation that this ILEC suggestion is untrue with respect to Xspedius, one of the nation's largest privately held CLECs. To the extent that Xspedius purchases DS-1 circuits from ILECs to serve our end user customers, we do so primarily through the use of UNEs, not Special Access. Indeed, only **31%** of the DS-1 circuits purchased by Xspedius from the ILECs are Special Access. However, if you discount Tampa, Florida — where UNE/EEL rates are still set at the same level as Special Access and it is therefore not worth the hassle that accompanies UNE purchases — then only **23%** of the DS-1 circuits purchased by Xspedius from the ILECs are Special Access circuits.

37. Nonetheless, it is worth explaining why Xspedius would order DS-1 Special Access from ILECs. There are several reasons. <u>First</u>, Xspedius often has been forced to order Special Access because ILECs refused to "construct" facilities. Xspedius has experienced an unusual number of these so-called "no facilities" issues with SBC in Texas. <u>Second</u>, historically, ILECs were not required to combine UNEs, and consequently CLECs that wished to use ILEC facilities to serve end users out of an ILEC central office where they were not collocated were forced to order such facilities as Special Access. Even upon reinstatement of the

FCC's UNE combinations rules, the ILECs were intransigent in permitting CLECs to order such combinations. The ILECs have been similarly dilatory with regard to converting Special Access circuits to stand-alone UNEs. Third, when requesting conversion from Special Access to UNE/EEL, Xspedius has experienced endless negotiations and foot dragging, delayed conversion requests, requirements for circuits to be disconnected and reconnected, threats from the ILECs to impose exorbitant conversion charges, and overly long provisioning intervals. Fourth, the ILECs historically have prohibited commingling of access services and UNEs on the same facilities to serve an end user customer, thus posing yet another barrier to CLECs ordering UNEs. Finally, even CLECs such as Xspedius provide "non-qualifying" services such as stand-alone interexchange services, and we are not permitted to order UNEs for use in providing these services. Although, as discussed above, the FCC has improved upon the EEL usage tests, those tests have still not been implemented in current interconnection agreements. Accordingly, because of the older, complicated EELs usage tests, there are also many "false positives," where customers buying substantial local service must nonetheless be provisioned over Special Access circuits once the EEL usage restriction tests are applied.

38. Just to provide one example among many, Xspedius has recently experienced a significant increase in the number of UNE orders rejected by SBC Texas because there were "no facilities" available, and it would ostensibly require more than "routine network modifications." Yet when ordered as Special Access, the same circuits are provisioned with alacrity. When questioned, SBC claims that extensive construction was in fact required. Xspedius does not have the resources to file complaints on every such circuit. Xspedius also only recently began converting Special Access circuits to UNEs/EELs with Qwest. Historically, e.spire (whose assets Xspedius purchased) suffered lengthy delays into the negotiation of an EEL amendment. When e.spire needed to convert circuits from Special Access to EEL with SBC, it

required a complaint at the FCC. Even then, SBC only agreed to convert a discrete number of circuits. Increasingly, due to changing rules relating to access at the customer premises, SBC will not bring a UNE or EEL circuit past the minimum point of entry in a building. Sometimes, they won't even agree to bring it that far. These types of nuisance tactics are common among the ILECs, forcing Xspedius to order, for more demanding customers, Special Access circuits to meet our customers' immediate needs.

39. Xspedius's experience is that ILECs have continued to engage in these practices, many of which are anticompetitive, and were designed to prevent CLECs from ordering UNEs, or converting Special Access circuits to UNEs. Similarly, notwithstanding the FCC's self-effectuating prohibition on unnecessary charges to convert Special Access to UNEs, Xspedius continues to face ILEC imposition of such charges. For example, when Xspedius attempted to convert Special Access circuits to UNE loops (as opposed to EELs), BellSouth hit Xspedius with charges of over **$800 per circuit**. Xspedius thus could not pay to convert the circuits and had to implement them through disconnects and reconnects, including nonrecurring charges for both activities. Xspedius had to pay similar nonrecurring charges for the same activities with SBC. Very often, because of the commingling rules, Xspedius cannot convert a circuit in its current configuration. (For example, the Special Access T-1 may be riding a Special Access DS-3, which could not accommodate a commingled UNE T-1.) Conversions also result in lengthy delays. As a result, a significant portion of Xspedius conversions – including all recent conversions with both SBC and BellSouth — are implemented through expensive nonrecurring disconnect and reconnect charges. In addition, BellSouth will not allow Xspedius to "lift and lay" the same circuit for both the Special Access and the UNE circuit; they require a customer-disrupting re-order of a new circuit, even though the Special Access circuit is readily available to the same location. In the end, given what CLECs pay and endure to convert circuits

to UNEs, it is not surprising that some portion of CLEC T-1 inventories remain on ILEC Special Access.

40. I must observe that there is no reason to believe that ILECs will reduce Special Access rates in the foreseeable future to be more closely aligned with cost-based UNE prices. Indeed, the market evidence shows that the reverse is true. Over the past two months, several ILECs have filed for major, across-the-board increases in Special Access rates. Thus, what we are observing in the real world is a steady increase in Special Access pricing, despite the fact that ILECs already are realizing incredible profit margins of 40% or more on average on the service.

41. The ILEC determination to drive Special Access prices through the roof should not be surprising. They know that Xspedius and other CLECs rely upon the availability of ILEC DS-1 loop facilities to connect to customers, and that we must pass any ILEC loop charges through to our customers. Thus, if our only option is to purchase Special Access services, the ILECs can inflate our cost of service substantially — and create a classic price squeeze. Whereas the availability of cost-based UNEs as an alternative previously provided CLECs an option to avoid being caught in the squeeze, the elimination of UNEs (or even the prospect of it) provides an incentive and an opportunity for ILECs to raise Special Access prices to uneconomic levels. In the end, the ILECs profit more by CLECs exiting the market than by CLEC Special Access purchases because CLEC retail customers return to the ILEC, which then regains 100% market share.

42. Finally, I understand that ILECs have suggested that pervasive use of Special Access by CMRS carriers is powerful evidence that wireline CLECs such as Xspedius do not require the use of UNEs. The differences between the business of CMRS carriers and wireline CLECs are fundamental and too numerous to go through here. But a few key

distinctions are worth mentioning in the context of this proceeding. CMRS carriers do ***not*** use ILEC Special Access services as loop facilities to connect to end user customers. Their use of Special Access service is limited to interoffice transport, backhaul, and entrance facilities. CMRS carriers use their own wireless technology to provide a "loop" connection to the end user. Thus, the experience of CMRS providers is fundamentally different, and largely irrelevant, to the question of whether Xspedius' ability to provide service is impaired without access to cost-based ILEC UNE loops. CMRS carriers have also had a dramatically different track record in terms of running profitable businesses as compared to CLECs. While virtually every facilities-based CLEC went into bankruptcy in recent years, CMRS carriers run vibrant, profitable companies. These types of financial differences are exactly what the D.C. Circuit focused on in *USTA II* when discussing CMRS entry with Special Access. It is therefore at least logically consistent that CMRS carriers might not be impaired without UNEs, while CLECs would be severely impaired.

43. Thus, while Xspedius utilizes DS-1 and DS-3 Special Access facilities, it does not do so by choice. We strongly prefer DS-1 UNEs and have consistently tried to order loop facilities as UNEs, and convert them to UNEs where we have been forced by ILEC restrictions to order them first as Special Access. Indeed, the evidence is clear. If Xspedius were compelled to order all of its DS-1 loop facilities as Special Access, our existing integrated voice and data services offered to small- and medium-sized business customers would be rendered uneconomic, and our ability to offer service to off-net customers would end.

This concludes my Declaration.

James C. Falvey
Xspedius Communications, LLC

October 1, 2004